United States Court of Appeals

for the Second Circuit

APPENDIX

75-7663

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7663

AJAX HARDWARE MANUFACTURING CORPORATION

Plaintiff-Appellant,

-v.-

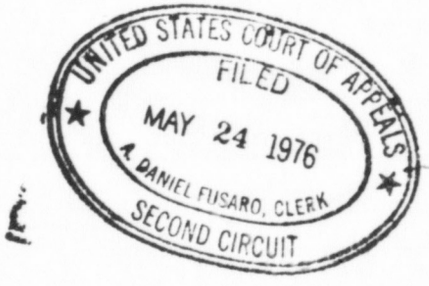
INDUSTRIAL PLANTS CORPORATION

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

JOINT APPENDIX

VOLUME III (Pages A-681 through A-1006)
DOCKET ENTRIES
PORTIONS OF RECORD ON APPEAL



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7

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INDEX TO APPENDIX

VOLUME I

Designated Portions of Record on Appeal		Appendix Page
A-E	Docket Entries	A-1
R-1	Complaint, filed May 5, 1969	A-6
R-7	Defendant's Answer dated June 5, 1969	A-14
R-23	Pre-trial order dated January 11, 1974	A-16
R-24 (in part)	Plaintiff's Requests to Charge, dated February 19, 1974 - Nos. 11, 12, 15, 17, 18, 19	A-30
R-25 (in part)	Plaintiff's Supplemental Requests to Charge - Nos. 24, 25, 27, 29, 30	A-39
R-28	Defendant's Affidavit for Adjournment of trial, dated March 6, 1975	A-50
R-29	Plaintiff's Affidavit in Support of Motion for Adjournment, dated April 18, 1975 (endorsed with Order of Judge Levet, April 22, 1975)	A-52
R-31	Defendant's Motion for Judgment n.o.v. or a New Trial with Affidavit of Arnold Stream, dated May 8, 1975	A-75
R-33	Plaintiff's Motion for Judgment n.o.v. or a New Trial on Damages with Affidavit of Murray Gartner dated May 12, 1975	A-93
R-37	Memorandum and Order on Post-Trial Motions dated May 28, 1975	A-108
R-38	Notice of Motion to Amend Order, dated June 5, 1975	A-115
R-39 (in part)	Affidavit in Opposition to Motion to Amend Order, dated June 10, 1975 (pp 1-8)	A-121

		Appendix Page
R-41	Memorandum and Order Denying Plaintiff's Motion to Amend Order Pursuant to 28 USC §1292(b), dated June 11, 1975	A-129
R-42	Plaintiff's Motion Under 28 U.S.C. §455 with Affidavit of Murray Gartner, dated June 10, 1975. (endorsed with Order of Judge Levet on June 24, 1975)	A-132
R-44	Letter from Hon. Richard Levet to counsel, enclosing proposed form of Special Verdict, dated July 10, 1975 (with special verdict form)	A-140
R-45	Form of Special Verdict Proposed by Defendant, dated July 23, 1975	A-143
R-46	Plaintiff's Proposed Special Verdict and Objections to Special Verdict, dated September 2, 1975	A-146
R-48	Defendant's Request for Production of Documents Pursuant to Rule 34 F.R.C.P., dated September 10, 1975	A-161
R-49	Response to Defendant's Request for Production of Documents Dated September 10, 1975; dated September 22, 1975	A-165
R-50	Motion for Protective Order and Other Relief and Affidavit, dated September 23, 1975	A-171
R-51	Notice of Intention to Amend Defendant's Answer, dated September 22, 1975	A-227
R-54	Requests for Admissions of Defendant, dated September 25, 1975	A-229
R-56	Stipulation, dated September 30, 1975	A-233
R-59	Notice of Intention to Seek the Amendment of the Pre-Trial Order, dated October 2, 1975	A-235

		Appendix Page
R-60	Second Notice of Intention to Amend Defendant's Answer Dated October 2, 1975	A-237
R-61	Affidavit in Opposition to Defendant's Notice of Intention to Amend Answer and Pre-Trial Order, dated October 8, 1975	A-239
R-62	Plaintiff's Requests to Charge dated October 9, 1975	A-245
R-71	Plaintiff's Additional Special Verdict Question	A-247
R-72	Plaintiff's Additional Request to Charge	A-248
R-73	Final Judgment dated October 24, 1975 and entered October 28, 1975 (Special Verdict annexed)	A-249
R-74	Notice of Appeal	A-253
R-89	Plaintiff's Motion to Correct Record on Appeal, dated March 11, 1976	A-255
R-90	Defendant's Objection to Plaintiff's Proposed Further Statement of Proceedings, dated March 17, 1976	A-322
R-91	Affidavit of Arnold Stream, Esq. in Opposition to Plaintiff's Motion, dated March 17, 1976	A-324
R-92	Reply Affidavit of Edward Brill in Support of Motion to Correct Record on Appeal, dated March 24, 1976	A-331
R-93	Memorandum and Order on Motion to Correct Record on Appeal (Levet, J.), dated March 31, 1976	A-337

Designated Portions of Transcript of Proceedings

VOLUME II

	Appendix Page
April 17, 1975	A-344
April 18, 1975	A-367
April 23, 1975	A-370
April 24, 1975	A-485
April 25, 1975	A-600

VOLUME III

April 28, 1975	A-681
April 29, 1975	A-784
April 30, 1975	A-902
May 1, 1975	A-988

VOLUME IV

June 9, 1975	A-1007
September 12, 1975	A-1026
October 2, 1975	A-1033
October 14, 1975	A-1044
October 15, 1975	A-1135

VOLUME V

October 16, 1975	A-1307
October 17, 1975	A-1474

VOLUME VI

	Appendix Page
October 20, 1975	A-1638
October 21, 1975	A-1752
October 22, 1975	A-1848
October 23, 1975	A-1949

MR. STREAM: Your Honor, may I speak on the record again?

THE COURT: Yes.

MR. STREAM: I am trying to reach an accommodation with Mr. Gartner in order to shorten his proof and resolve the problem that he thinks he has in establishing payment which is the basis or the legal predicate for his claim of damage.

I am prepared now to stipulate with him or consent that he introduce directly into evidence in accordance with the provisions of the pretrial order, but without the need for having a witness lay a foundation, the note which Time & Micro gave to the First Western Bank & Trust Company for $270,000; the supporting security agreement; the debit to the account of Ajax when they had to make good on a balance unpaid of $163,000; and a subrogation receipt.

THE COURT: All right.

You are satisfied as to the proof then of how much they paid and why?

MR. STREAM: Yes.

THE COURT: That is very good.

MR. GARTNER: Your Honor, there is only one thing to be said. I asked Mr. Stream to stipulate to

this on Friday and he flatly refused.

THE COURT: Well, he had a right to do so.

MR. GARTNER: Of course he did, your Honor.

THE COURT: Now, what is your statement now?

MR. GARTNER: Your Honor, if you will let me complete one sentence, please -

THE COURT: Yes, I will let you complete all your sentences. I never stop you.

MR. GARTNER: I have to disagree with you, your Honor.

THE COURT: Oh, I interrupt you because I think I see what is coming and I want it the way I would like to take it.

Will you stop yapping at me in plain language?

MR. GARTNER: Your Honor, I am not yapping at you. I am trying to make a statement.

THE COURT: Go ahead and make it. I tell you to make it.

MR. GARTNER: Every day begins this way. Every time I try to make a statement your Honor shouts at me and uses that tone.

THE COURT: The tone means nothing, as I have said.

MR. GARTNER: I think the tone means a great

deal, your Honor. It sets the atmosphere of this trial, particularly in front of the jury. And I am trying to make a simple statement.

THE COURT: Go ahead and make the simple statement.

MR. GARTNER: You allowed Mr. Stream --

THE COURT: If it is so simple, why don't you go ahead and state it?

MR. GARTNER: You allowed Mr. Stream to say everything he did without a single interruption and the moment I started to talk, you interrupted me.

THE COURT: And why? Because he had the floor and he agreed to a stipulation. I don't know why you should not listen yourself.

MR. GARTNER: Because he forced me to bring a witness to court on Friday, because he wouldn't stipulate on Friday, your Honor.

THE COURT: What witness was called?

MR. GARTNER: I have the account supervisor from Ajax Hardware Company today prepared to testify to these things.

MR. STREAM: All right, suit yourself.

MR. GARTNER: Your Honor, I am perfectly willing to accept the stipulation. I don't want to waste time by

putting witnesses on the stand.

THE COURT: What do you want me to do?

MR. GARTNER: But what I am asking your Honor to do is this: I don't think that Mr. Stream should be allowed to blow hot and blow cold. This time he says he will allow in certain documents that have been marked on the pretrial order. He agreed to do that at the beginning of the trial, then he refused to do it. Now he is saying that these particular documents he will agree to allow in without testimony.

I think he ought to be held to his agreement at the beginning of the trial that all the documents marked on the pretrial order as to which he has conceded authenticity would be allowed in evidence.

THE COURT: Now, let me ask you a question.

MR. GARTNER: And we should not be -

THE COURT: Wait a minute. I am asking you a question and I am interrupting you and I did it intentionally.

MR. GARTNER: Yes, your Honor. Thank you.

THE COURT: Wasn't there a stipulation reserving as to relevancy?

MR. GARTNER: As to these documents he had said he would not object to the relevancy, your Honor.

THE COURT: Where is the pretrial order that says that?

MR. GARTNER: Not in the pretrial order.

THE COURT: Well, where?

MR. GARTNER: In the discussions in chambers I pointed out to your Honor several times already when we said we needed Mr. Louis as a witness to prove certain letters and to prove certain--

THE COURT: I don't know what he said particularly.

MR. STREAM: May I cut this short, your Honor?

MR. GARTNER: I will point it out to your Honor, if your Honor will allow me. I will get the transcript. I don't think he hsould be allowed to blow hot and cold.

THE COURT: You said you will accept those stipulations. That is it, that is all I have to say.

MR. STREAM: I haven't heard him say it.

MR. GARTNER: I said I would be prepared to accept it if he will agree the other documents on the pretrial order will be introduced in the same way.

MR. STREAM: I don't know what they are. We are getting to the end of the plaintiff's case and I would like to know what those documents are.

(In the robing room)

THE COURT: Do we have the exhibits?

MR. STREAM: Yes, I'm going to read into the record,with the Court's permission,what I am going to allow into evidence--

MR. GARTNER: I object to Mr. Stream saying that he will allow it into evidence.

We have stipulated, your Honor.

THE COURT: All right. Why don't you take it and stop quibbling, Counsel.

MR. GARTNER: Your Honor, I am not quibbling and I think I am entitled to be heard without your Honor shouting at me every time I say something.

THE COURT: Yes, because you interrupt the proceedings, that is why.

MR. GARTNER: I don't interrupt the proceedings, your Honor. We have reached a stipulation and I think it should be said that we reached a stipulation; not that he is going to allow it into evidence. It is upt to your Honor to decide.

THE COURT: Take it or leave it, Counsel. I don't care.

State what you will allow in evidence without further proceedings. That will solve this thing, I hope.

MR. STREAM: The defendant will allow into evidence without further proceedings or objection on his part and for use as competent evidence for all purposes the following exhibits so marked during the pretrial depositions:

MR. GARTNER: Or the originals of them,your Honor. We have the originals and it was agreed -- for God's sake, what difference does it make?

MR. STREAM: Whatever copies, whatever version the plaintiff wishes to use.

THE COURT: Now you have got what you want.

Continue and please don't interrupt him. Wait until he is through.

MR. GARTNER: Your Honor, I have got to protect the plaintiff's interests in this case.

THE COURT: You are protecting him ad infinitum, Counsel, there is no doubt about that.

MR.GARTNER: Your Honor, I cannot allow counsel to do whatever he pleases.

MR. STREAM: Your Honor, I get the distinct impression that counsel is trying to bait this Court.

MR. GARTNER: I am not doing that. I very seriously object to that comment, your Honor. I am going to ask for an inquiry on this if this is the way counsel

is trying to proceed.

I am not trying to bait this Court. This Court and counsel are acting in such a way as to prevent me from speaking when I am entitled to speak.

THE COURT: No, you will always be allowed to speak.

MR. GARTNER: I am going to ask for an inquiry if counsel persists.

THE COURT: Subside and listen.

Proceed, counsel.

These are to be accepted without objection or the originals thereof?

MR. STREAM: That's right.

THE COURT: Proceed.

MR. STREAM: A letter dated August 30, 1966, from Sidney Kriser to Howard Klein, marked Pretrial Exhibit 33.

A sales catalog of the defendant respecting the Time & Micro auction sale marked Pretrial Exhibit 36.

A sales brochure of the defendant advertising the same auction sale marked Pretrial Exhibit 37.

The auction sheets of the defendant with respect to the Time & Micro sale marked Pretrial Exhibit 38.

A promissory note dated September 9, 1966 of

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Time & Micro Instruments, Inc. to First Western Bank and Trust Company for $270,000 marked Pretrial Exhibit 42.

A security agreement of Time & Micro Instruments, Inc. to the same bank dated September 2, 1966, marked Pretrial Exhibit 41.

The guarantee agreement of Ajax, the plaintiff in this action, to the same mentioned bank, dated September 1, 1966, marked Pretrial Exhibit 40. It may have been marked 42, I'm not certain.

MR. GARTNER: 40 is right.

MR. STREAM: 40.

The subrogation receipt and attached--

MR. GARTNER: Ledger card.

MR. STREAM: -- ledger card, which said receipt is dated 20th May, 1968, running from the Western Bank & Trust Company to Ajax, the plaintiff in this action.

And, finally, the advice of a debit from the First Western Bank & Trust Company to Ajax dated May 20, 1968, reflecting a debit of $163,270.70.

So far as I am concerned, your Honor, the plaintiff can use either the versions I have in front of me which are Xeroxed or originals or some of each as he chooses.

THE COURT: Does it cover it, counsel? Does it

cover the exhibits?

MR. GARTNER: Your Honor, it covers what we stipulated to.

I have one other proposal.

THE COURT: What is that?

MR. GARTNER: There is an additional document similar to the debit memo which counsel has agreed to put in evidence, to have put in evidence.

THE COURT: You agreed to consent to put them in.

MR. GARTNER: Which shows the payment of $20,000 by Ajax for the remaining equipment which was not sold at the auction sale and I have the witness here. I can put it in through her testimony, that that $20,000 was paid for all of the remaining equipment.

THE COURT: Was that a credit to the defendant? What is the purpose of it?

MR. GARTNER: It is not a credit. It shows that the $270,000 of evaluated equipment was sold for $20,000, but since we got the machinery, it is not a credit.

THE COURT: Do you object to that one?

MR. STREAM: I don't know what it is, but I consent to it.

MR. GARTNER: All right, we will put that in also.

"Q You knew, did you not, that Ajax --"

THE COURT: Just a minute. What line is this?

MR. GARTNER: Line 22.

THE COURT: Yes.

"Q You knew, did you not, that Ajax wanted a quick appraisal and you knew that they were waiting for the appraisal?

"(Witness shakes head.)

"MR. BERMAN: Answer verbally."

THE COURT: Read the verbal answer; never mind the head shakes.

MR. GARTNER: Yes, your Honor.

"A Yes.

"Q You knew those things, did you not?

"A Yes, I did.

"Q Did you also know that they were going to rely upon your appraisal in some course of dealings that they had with Time and Micro?

"A Yes."

MR. GARTNER: Now I would like to turn to page 47, your Honor.

THE COURT: You are going backward?

MR. GARTNER: It relates to this subject, your Honor.

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THE COURT: Page 47.

MR. GARTNER: Page 47, Line 12.

"Q Let me ask it this way: At any particular time in any particular appraisal what was the greatest number of watch making machines that you were called upon to appraise?

"A It varied. It could have been a small department of a large company, where they did some precision work; if they made instruments or anything resembling watch making which required precision machines, it was then that I saw these Swiss machines.

"Q Which Swiss machine?

"A For precision watch making."

MR. GARTNER: Page 48, just continuing.

"Q About how many would you say you had seen at any one occasion?

"A I really can't answer that because I don't remember but it could have been a dozen machines in one department where they did precision work, instrument work."

MR. GARTNER: Then on page 50, line 7 -- Well, I will have to go back because the question follows a previous question.

MR. STREAM: Your Honor, may he just read the questions without these comments to the jury.

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MR. GARTNER: Allright.

THE COURT: Let's go back. What page are we at now?

MR. GARTNER: We are on page 49, line 3.

"Q Can you answer that last question now, Mr. Thaler?

"A How many I appraised?

"Q Yes.

"A I don't think it was ever more than 25 or 35 machines of this type, but I have seen complete plants like the Bulova plant I went through without having to make an appraisal. But I am familiar with the type of equipment.

"Q Do you recall any specific occasion on which you made an appraisal which included these 25, approximately 25 machines, that you say you may have appraised? Do you remember the company for whom you made that appraisal?

"A At the moment, I can't say that I can mention the names of the companies."

MR. GARTNER: Going to page 159, line 14.

"Q Mr. Thaler, was there any other communication between you and the Ajax Company between August 19, 1966, and the time that you received the letter from Mr. Lewis dated August 23, 1966, whici has been marked Plaintiff's Exhibit 3 for identification?

"A No.

MR. STREAM: Your Honor, I respectfully object to this practice of jumping back and forth. Questions and answers should be read seriatim. Counsel has a right to skip.

THE COURT: I don't know it makes much difference. I am going to overrule that objection.

MR. GARTNER: Thank you very much.

THE COURT: Don't do it if you don't have to.

MR. GARTNER: I don't, your Honor. It is because the subjects are related.

THE COURT: 82?

MR. GARTNER: 82, line 3, your Honor.

"Q When you met Mr. Haakenson at the Wall Street Heliport did you have a conversation with him about the appraisal?

"A Naturally we talked about what we were going to see.

"Q What did you say and what did he say?

"A Well, he told me that what I am going to see was a highly precision plant that was originally designed and engineered to produce precision watch work and that the plant is presently shut down, was presently shut down, and that it was the desire of the Ajax Company to utilize this plant which Mr. Haakenson was quite familiar with, to

advise them that the equipment contained in this plant was in principal the kind of machinery that they would require in order to make the fuses with the government."

THE COURT: "for the government."

MR. GARTNER: Sorry, your Honor; "for the government."

THE COURT: Is that all on that page?

MR. GARTNER: Yes, your Honor.

THE COURT: Now where do we go?

MR. GARTNER: Page 180, your Honor, line 17.

"Q Mr. Thaler, on plaintiff's exhibit 2 for identification" -- that is trial Exhibit 12, the Hirschman report or appraisal --"let us take the first listed machine under the one which is marked 'sold," and crossed out, on the first page; you see that?

"This is described as inventory number 5040, Hauser ~~Hausner~~ 2-spindle profile miller.

"A Yes.

"Q Is this the appraised value which you gave to it, $8,000, in the last column?

"A Yes.

"Q Marked in red. I notice that there are other figures in red. Is that right?

"A Yes.

"Q The figure of $8,000, which had been typed there was stricken out and over it was written $9500 --"

THE COURT: Well, read the rest of the question.

"What is that figure?

"A The replacement value.

"Q And that was your judgment of what the replacement value in 1966 was, $9500?

"A I ascertained that the replacement cost was $9500.

"Q How did you ascertain that?

"A I think it was in the discussion with Mr. Haasekson about the value of that machine.

"Q Do you mean that Mr. Haakenson told you that its replacement value was $9500?

"A 9500; yes.

"Q And that was the only source --

"A (interposing) May I add to that?

"Q Yes.

"A It could have been after I came back that I made some inquiry in connection with this machine.

"Q Is it your testimony then that you may have written this figure of $9500 after you came back?

"A It is possible, but not very likely.

"Q But, at any rate, the figure of $8000, which was

your appraised value, that was written in the plant on August 15th?

"A That was written in the plant, that's right.

"Q What about this change in the figure of $6000 which is listed in the column of Market Value to Watch?"

MR. GARTNER: If I can point out to the jury, the typed figure of $6000 in the original Hirschmann report has been changed in red to $8000.

THE COURT: Finish the question, please.

MR. GARTNER: Yes, your Honor.

"Apparently you changed $6000 to $8000.

"A I did that because I thought that the value was greater than $6000 for that machine.

"Q And do you think you made that change in the plant?

"A Yes.

"Q I take it that you base that determination on your experience and your knowledge.

"A That is true.

"Q When you say that your belief was that the value of that machine at that time was $8000, were you estimating that value for uses of that machine as watch-making equipment or any any other uses that it might have?

"A In any other way that this machine could be utilized.

machines that made the plant as useful as it is or was, useable, instead of useful."

THE COURT: That is all in the question?

MR. GARTNER: In the answer, your Honor.

THE COURT: Very well. Next question.

"Q How did you arrive at that value?

"A Well, I established the value based on what it coast new and --

"Q How did you know what it cost new?

"A Or rather the replacement value, which was indicated on this list by Mr. Hirschmann's company.

"Q In other words, you arrived at the value of $8000 as the present 1966 value of this machine by taking the replacement value of $8000 which Mr. Hirschmann had indicated in 1964?

"A Yes.

"Q And what operation did you do with that replacement value in order to arrive at the final figure of $8000? If I may clarify it, the Hirschmann replacement value was indicated as $8000; is that correct?

"A Yes.

"Q Did you simply assume that in 1966 that machine would simply be worth $8000?

"A The demand for that machine --"

THE COURT: Just a minute. Did you read "1966" or some other figure, the date?

MR. GARTNER: In the last question?

THE COURT: Yes.

"Q Did you simply assume that in 1966 that machine would simply be worth $8000?

"A The demand ~~answer~~ for that machine then was as great as it was in 1966, 1964.

"Q How did you ascertain that?

"A Because in principle, there was a great demand for machinery and there was no change or depreciation in values in the two years since the appraisal made by Mr. Hirschmann.

"Q There was a great demand for any machinery.

"A Any machinery.

"Q Then it is your testimony, Mr. Thaler, that in making this appraisal you simply assumed that any replacement value which Mr. Hirschmann had indicated in 1964 continued to be the fair market value of all of the machines that Mr. Hirschmann had appraised because there was a great demand for all kinds of machinery?

"A Yes.

"Q And that was the basis upon which this appraisal was made?

"A I knew from other sales that we had conducted, that we had a great response to all of our sales by buyers who were willing to pay top prices for machinery.

"Q Are you talking about auction sales?

"A I am talking about the market.

"Q Yes. Are you talking about auction sales?

"A Or liquidation.

"Q Or liquidation?

"A Fire or liquidation.

"Q And therefore you were assuming that any machine or any good machine that was worth $8000 in 1964 would continue to be worth at least that?

"A I assumed ~~assume~~ that.

"Q In the view of your experience in our auction sale?

"A And liquidation."

MR. STREAM: Please, your Honor. When counsel reads his questions and answer, he shouldn't say "and liquidation." I want the record to reflect he emphasized them with an increased decibel tone .

THE COURT: Don't try to emphasize the answers.

MR. GARTNER: Thank you, your Honor. I will try to do it in a sensible way.

THE COURT: Proceed

"Q And liquidation?

"A Yes."

MR. GARTNER: The next question on line 15 on page 187:

"Q As a matter of fact, Mr. Thaler, you never knew the original cost of any of these machines, did you?

"A Not accurately.

"Q In any way?

"A Yes. I knew that they were all small machines and they were very costly.

"Q Did you know the specific original cost of any of these machines on this inventory?

"A No.

"Q And you made no inquiry about that?

"A I didn't have --

"MR. BERMAN: Just answer the question.

"A I made no inquiry."

MR. GARTNER: On page 188, line 22.

"Q Now, Mr. Thaler, on the same first page, there is a machine listed as inventory number 5500, a micron horizontal single spindle profile miller, I think it is.

"A Yes.

"Q You valued that at $3000," in the last column.

"A That's right.

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"Q How did you arrive at that figure?

"A Only when I saw the condition of the machine, what it was, and I thought in my best judgment that the machine was worth about $3000.

"Q What did you base that on?

"A My own general knowledge of machinery.

"Q Was that based on your general knowledge that a purchaser would pay $3000 for that? Did you have knowledge that there was any general purchaser or any group of purchasers or any specific purchaser who would be willing to pay $3000 for that machine?

"A This value was --

"MR. BERMAN: Read the question back, please.

"(The question was read.)

"A I didn't know of any such purchaser at the time.

"Q Did you make any inquiry about whether there was anyone or whether there was likely to be anyone who would be willing to pay $3000 for this machine, inventory number 5500?

"A No.

"Q Did you have any knowledge about where such a machine could be used?

"A Not specifically.

"Q Did you have any knowledge at that time of what

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kind of market demand there was for this specific machine?

"A No.

"Q Now, Mr. Thaler, in the Hirschmann table, the indicated replacement value for the machine with inventory number 5500 was $5000."

MR. GARTNER: That is in the first column, headed "Replace Value."

"A Yes.

"Q Why did you value that machine at only $3000?

"A It could have been particularly for the reason that the machine's condition was not as I would expect it to be worth $5000.

"Q You don't have any specific notation, though, about whether that machine was in good condition or bad condition?

"A It is indicated by the fact that I devalued it.

"Q And you think that that is the reason that it must have been in poor condition?

"A That's right.

"Q In other words, your testimony is that if this machine had been in excellent condition you would have valued it at $5000?

"A Or thereabouts.

"Q Or approximately the same amount which Hirschmann

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had valued it at in 1964?

"A Yes.

"Q Did you follow that procedure with other machines listed on this inventory?

"A That was the purpose of my inspection of each machine.

"Q In other words, the purpose of your inspection of each machine was simply to see whether it was in excellent, fair or good condition and, based upon your determination of the condition in which the machine was, you valued it at either the same amount that Hirschmann had valued it at or a lesser amount, if it were in poor condition?

"A That is correct.

"Q And that was the procedure that you followed throughout the appraisal?

"A That's right.

MR. GARTNER: I'll turn to page 195, line 7, your Honor.

"Q What is this machine, Mr. Thaler, this invoice number 54-60?"

MR. GARTNER: And that appears, your Honor --

THE COURT: Have you got the place?

MR. GARTNER: I am locating it on the Hirschmann report, your Honor.

THE COURT: Do you have to have that in order to go on with the answer?

MR. GARTNER: I would like to show it to the jury, your Honor.

THE COURT: Show what?

MR. GARTNER: Where it appears on the report.

THE COURT: Well, you don't need to stop to do that, counselor.

MR. GARTNER: I have it right here, your Honor. It is this page, 54-60 (showing to the jury).

"A That is a jig borer. It is a vertical machine with a vertical spindle which is used for very accurate drilling and boring which primarily is used for making tools which in turn are used to be placed on these machines.

"Q I see. Then that would be a machine which could be used generally in any machine shop?

"A That's right, any shop where they made their own tools and dies.

"Q Is this a foreign made machine or is this an American made machine?

"A 54-60?

"Q Yes.

"A That is a foreign made machine.

"A True.

"Q Now, is fair market value to your mind equivalent to replacement value?

"A Fair market value, as I indicated here, was what it was worth to the user in the plant intact, in place."

MR. GARTNER: Page 207, your Honor.

THE COURT: Yes. What line?

MR. GARTNER: Line 6.

"Q Did you have any judgment about whether if a watch making plant wanted to buy one of these ~~Hauzner~~ Hauser 2-spindle profile millers for use in the plant, the plant value of that machine would be more, less or the same as the value which you indicated here as the market value for a watch?

"A The value that I indicated here was, again, based on the value of that machine -- the answer is no.

"Q Does that mean that you had no judgment?

"A I did not give it any consideration.

"Q You did not give it any consideration?

"A No, I did not.

"Q What would the value of one of these machines be on the assumption that someone wanted to buy that particular machine for a watch making plant?

"A That would depend on the market conditions at that time.

"Q And you had no idea at the time you made this appraisal of what the market conditions were?

"A I did not think in those terms at the time.

"Q I would like a yes or no answer.

"Did you have any idea at the time of what the market conditions were for these machines?

"A Only that they were desirable machines.

"Q But you had no idea at all of what the market demand for any particular machine on this list was?

"A The demand was good.

"Q With respect to a particular machine, with respect to this ~~Hauzner~~ Hauser 2-spindle profile miller, did you have any idea of what the market demand was for that machine?

"A The market demand for precision machines was good at the time.

"Q For that machine, not for precision machines. I want to know with respect to this machine.

"A This is only one part of precision machinery.

"Q This particular machine, Mr. Thaler, did you have any idea of what the market demand was for this particular machine?

"A The market for this and any other precision machine was good.

"Q Do you mean the market demand?

"A Yes. The market demand for this and other machines at the time was good.

"Q On what do you base that judgment?

"A That in general --

"Q I am referring specifically to the ~~Hauzner~~ Hauser 2-spindle profile miller.

"A I can't answer that question because I did not make any investigations as to whether a ~~Hauzner~~ Hauser, one ~~Hauzner~~ Hauser machine had any particular -- whether there was any greater demand for a ~~Hauzner~~ Hauser machine than any other machine or less.

"Q You had no specific knowledge about market demand for this particular machine?

"A No. Only in general that there was a demand for all machine tools, particularly precision machines.

"Q Well now, Mr. Thaler, you are an expert appraiser and you say that it was your judgment that this machine, this ~~Hauzner~~ Hauser 2-spindle profile miller, had a market value for watch in place in the plant of $8,000.

"A Yes.

"Q As an appraiser, I am asking you your

judgment as an appraiser. What would your judgment be about the value of that same machine in terms of the price which it would command from a buyer who wanted to use that machine in a watch making plant?

"A I only judged the value.

"Mr. Berman: Answer the question, please."

MR. STREAM: Read the rest of it, please. Please read it verbatim.

MR. GARTNER: "Mr. Berman (addressing the reporter): Please read the question back.

"(Question read.)

"A I have no judgment.

"Q You have no judgment at all?

"A No.

"Q And you had no judgment about that at the time that you made this appraisal?

"A I did not give it any consideration."

MR. GARTNER: Page 212, line 13:

"Q Mr. Thaler, when did you start to prepare this typed appraisal which is Plaintiff's Exhibit 12 for identification?

"A Upon my return from Strassburg.

"Q Immediately upon your return from Strassburg?

"A It may have been the next day or the following

day.

"Q It was either August 16th or August 17th?

"A Or thereabouts.

"Q Did you get any specific request to prepare this appraisal?

"A We do that regularly. That is our appraisal."

MR. STREAM: This is our --

"A This is our appraisal, our written appraisal.

"Q In other words, this is what you were hired to do?

"A Right.

"Q In this case by Ajax, this document, Plaintiff's Exhibit 12 for identification" -- which is Plaintiff's Exhibit 5-A on trial.

"A Right.

"Q And your telegram, which is Plaintiff's Exhibit 4 for identification, was simply an interim statement of your appraisal because they wanted a quick answer?

"A That's correct."

MR. GARTNER: Now we go to page 107 because it relates to the telegram.

THE COURT: Now you are going back again.

MR. GARTNER: It relates to the telegram, your

Honor.

THE COURT: All right. 107.

MR. GARTNER: Line 2.

"Q You say, then, that you after talking with Mr. Klein on the evening of August 15, 1966, thereafter confirmed by telegram the appraisal which you had made?

"A That's right.

"Q Was that done pursuant to his request or did you do that simply because you thought that was the professional thing to do?

"A I thought it was the professional thing to do to confirm my telephone conversation."

MR. GARTNER: Line 23.

"Q When was this telegram sent, Mr. Thaler? Do you know?"

MR. GARTNER: Referring to Plaintiff's Exhibit 3 on trial.

"A Immediately after my telephone conversation with Mr. Klein. I believe from the offices of the plant.

"Q Do you mean that you telephoned it in?

"A Yes, I think so. The address of where it was sent must be on that telegram. If I remember correctly, it was at 10:52; is that correct?

"Q Yes, I think that is what it says.

10:52 p.m. or P.

"Anyhow, I take it that that means p.m. But I am puzzled by the fact that there is a date of August 19th in this corner (indicating)."

That is this date of August 19th.

"Can you explain what that is (handing to the witness).

"A That is a copy of the telegram that I wired from the plant and we received it at this date.

"Q In other words, the copy was dated August 19th but in fact you mailed it on --

"A (Interposing) No, I did not mail it.

"Q I am sorry. You in fact telephoned the telegram from the plant, from the Time and Micro Plant on August 15th?

"A Right.

"Q At 10:52 p.m.?

"A Right."

MR. GARTNER: Now we have to go to 149 to clarify that still further, your Honor.

THE COURT: A hop, skip and a jump but go ahead.

MR. GARTNER: Your Honor will see the reason for it in a minute.

MR. STREAM: Please, no comments, your Honor.

Don't be hurt by my comments.

MR. GARTNER: Well, as long as you can comment and I can't, I guess I'll have to accept that.

And please don't comment that way in front of the jury, Mr. Stream.

THE COURT: Well, both sides, neither side should comment and the jury will disregard no matter what the comment is.

What page is that?

MR. GARTNER: 149.

THE COURT: Stick to our reading.

MR. GARTNER: Line 1. Sorry, line --

THE COURT: Are you going back again now? 148?

MR. GARTNER: Excuse me just a minute, your Honor.

Yes, 148, your Honor, line 6:

"Q In this letter, Mr. Thaler, you referred to your telegram dated August 17, 1966."

MR. GARTNER: And the letter is identified just before that as the August 19th letter, which is Plaintiff's Exhibit 4, dated August 19, 1966.

THE COURT: All right. What is the question?

MR. GARTNER: And it says, as stated in our telegram dated August 17, 1966.

The question is:

"Q What telegram is that?

"A (No response.)

"Q Is that Plaintiff's Exhibit 4 for identification?"

MR. GARTNER: That is Plaintiff's Trial Exhibit 3.

"A I don't know. I don't remember.

"Q A copy of which you furnished yesterday.

"A Would this be the date, the 17th? It is very difficult to -- I don't know what --

"Mr. Berman: Look at the letter.

"A Yes. August 17th was the date of the telegram.

"Q And that is Plaintiff's Exhibit 4 for identification that you are referring to and Plaintiff's Exhibit 13 for identification?"

MR. GARTNER: It is Plaintiff's Exhibit 3 and 4 on trial.

"A Yes.

"Q I believe you told us yesterday that the telegram was sent on the night of the appraisal, that it was phoned in at 10:52 on the night of August 15th.

"Is your recollection now refreshed by this letter that in fact the telegram was not sent until two days after you had completed the appraisal?

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"A Yes."

MR. GARTNER: Now, page 213.

MR. STREAM: 2 who?

MR. GARTNER: 213, Mr. Stream, line 13.

"Q When you were preparing your notes on August 15th on Plaintiff's Exhibit 2 for identification" -- it is Plaintiff's 12 on trial -- "you indicated a value of $4,000 as the market value for watch for machines which had inventory numbers 5503, 5504, 5504 and 5502, and in so doing, you changed the indicated market value for watch of $3,000" -- which had been on the Hirschmann report and I point to the red figure 4 written over the typed figure 3 in each of these items under the heading "Market Value for Watch."

THE COURT: Now the question.

"Q On what basis did you make that change?

"A On the visual condition of the machine. I thought it was in good condition and therefore it was worth more.

"Q These machines on which you checked the inventory numbers, they were the same machines which Hirschmann had indicated in 1964 were in its judgment worth $3,000?

"A In my judgment, however, as being responsible

MR. STREAM: Just a second. I'll ask that the Court direct counsel to read the next question and the last answer, please, beginning at line 12 of the page, page 216, immediately following the answer just read.

MR. GARTNER: Line 12, Mr. Stream?

MR. STREAM: Yes, please.

"Q Were you evaluating these machines in terms of their value for the production of watch movements?

"A I was evaluating them for the production of precision work in this plant, for what the plan was designed for as against -- as an integral unit of the plant."

MR. STREAM: Thank you.

MR. GARTNER: You are welcome, Mr. Stream.

THE COURT: Now which page?

MR. GARTNER: Page 219, line 23.

THE COURT: Proceed.

"Q Were you familiar with the Hirschmann Corporation in 1966?

"A No.

"Q You had never heard of them before?

"A I had heard of them but I had never had any contact with them.

"Q How had you heard of them?

"A Well, they are in the machine tool field,

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FOLEY SQUARE, NEW YORK, N.Y. 10007

importers of Swiss and German machines.

"Q Is that all you knew about them?

"A That's all.

"Q You knew none of the principals?

"A I knew nothing of any of the principals.

"Q Did you in 1966 talk to anyone associated with the Hirschmann Company?

"A No, I did not.

"Q Did anyone in your company do that?

"A Not to my knowledge.

"Q Can you remember when you first heard about the Hirschmann Corporation?"

MR. STREAM: Now, your Honor, I will lodge an objection as irrelevant and immaterial.

MR. GARTNER: Oh, your Honor, the facts -- the defense has said that they relied upon the Hirschmann report as an appraisal.

MR. STREAM: I'll withdraw my objection. It will go faster.

THE COURT: Go ahead, then.

"Q Can you remember when you first heard about the Hirschmann Corporation?

"A When I had this report -- oh, you mean when I first heard. Over the years we know the dealers in

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FOLEY SQUARE, NEW YORK, N.Y. 10007

different areas of different machine tools. We know the names.

"Q You knew the names but you knew very little else about the company?

"A Only that they were importers of Swiss and German machines.

"Q Did you know anything about their reputation as appraisers?

"A No.

"Q Had you ever had occasion to do business with them?

"A No.

"Q Or your firm? Did your firm ever do business with them?

"A Not to my knowledge.

MR. GARTNER: Page 222, your Honor, line 11:

"Q Isn't it true, Mr. Thaler, that machines become obsolete, that a machine which may be worth $16,000 in one year made two years later would be worth only its scrap value?

"A It is true.

"Q Did you make any inquiry with respect to what the market demand for the Gruen recess and boring machine was in August of 1966?

"A No.

"Q Did you make any inquiry as to whether there was any ready market for such a machine?

"A No."

MR. GARTNER: Page 227, line 13:

"Q Inventory number 5220 is a Waltham pallet milling machine which you apparently valued at $1500, is that correct?

"A Yes.

"Q How did you arrive at that value?

"A Which machine are you talking about?

"Q Here (indicating)."

MR. GARTNER: Here on the left, Waltham pallet milling machine, $1500.

" The Waltham?

"Q But you made no inquiry as to whether there was any market demand for that machine, the Waltham pallet milling machine? Is this a machine which has specialized use or a general use?

"A General use. It depends on what use it is put to and what kind of accessories or attachments you put on it for different types of operations.

"Q Did the fact that this machine was adaptable for general use enter into your evaluation of its value at $1500?

"A The fact that it was in this plant and could be used for the purpose for which it was intended in this plant, that is what determined my value.

"Q And you gave no thought to anything else?

"A No."

MR. GARTNER: Page 230, your Honor, line 20:

"Q These figures in this last column under the heading SPECREF" --

THE COURT: Period after SPEC. REF.

MR. GARTNER: Yes, there is a period after SPEC also. I'm sorry, I omitted the period. SPEC., REF.

"-- which I take it means special reference. They were your appraised figures, weren't they?"

MR. GARTNER: Mr. Stream is apparently amusing the

jury somehow, but I don't know what he's doing.

THE COURT: The jury may disregard it and I will ask him not to convert a courtroom into an amusement place. I don't know that he was.

MR. STREAM: I am just standing up here using this lectern.

THE COURT: All right, you may stand up there if you like.

MR. GARTNER: "The heading Special Ref. which, I take it means Special Reference, they were your appraised figures, weren't they?

"Q It is in the last column on all of these pages?

"A Yes.

"Q In Plaintiff's Exhibit 2 for identification"--Plaintiff's 12 on trial.

"A Yes.

"Q That heading had no ~~signature~~ significance to it, did it, Special Reference?

"A No.

"Q In other words, when you got these sheets, that last column was blank and you simply used that as the place for putting your figures?

"A Yes."

MR. GARTNER: Page 232, line 13:

"Q What about the item which is listed as inventory number 5390, ~~Ester~~ Essa BH 60 ton press RPD, what does that machine do?

"A That is a press that is used for blanking and punching.

"Q Does that have general application?

"A Yes.

"Q And you valued that at $25,000?

"A Yes.

"Q Would that machine have brought $25,000" --

THE COURT: Where do we go now?

MR. GARTNER: Next page, 233.

THE COURT: All right.

"Q Would that machine have brought $25,000 in your judgment on the market at that time?

"A I didn't give that any consideration as to what it would bring.

"Q Did you give any consideration as to what a buyer would be willing to pay for that maching, inventory number 5390, if Time & Micro were willing to sell it?

"A No, I did not."

MR. GARTNER: Page 236, line 3:

"Q What about inventory numbers 5060 and -69,

micron-semi-automatic lathe? You changed the market value for watch which had been assigned by Hirschmann from $3,000 to $4,000 each. What was the basis for that?

"A That upon examination of these machines by me and in my judgment, they were in excellent condition and were worth the value that I placed on them.

"Q Those machines, those micron semi-automatic lathes, would they have general application or use in any general machine shop?

"A No.

"Q Where would they be useful?

"A In shops where they did precision work.

"Q But they might be used in shops where they did precision work on watch making or fuse making?

"A Yes.

"Q Did you have any judgment about what those machines were worth on the market?

"A My judgment was not concerned as to the market.

"Q Did you have any judgment in that regard, Mr. Thaler?

"A No.

"Q Did you have any idea about what a buyer would pay for those machines or for each of those machines if

Time & Micro were willing to sell them?

"A Not without looking into the market at this time to see what they would bring on the market today.

"Q You mean at ~~speed~~ the time?

"A Yes.

"Q Did you look into the market then?

"A I didn't consider it from that point of view at the time.

"Q You didn't look into the market to see what the market would bring?

"A No.

"Q On those machines or any others in this inventory?

"A That is true."

MR. GARTNER: Your Honor, could we have a five-minute recess? I am getting a littly dry and I am sure the jury is getting a little --

THE COURT: Yes, I think we are all entitled to it. There is no dispute about that, counsel.

MR. GARTNER: Thank you, your Honor.

(Recess)

THE COURT: Let's go on.

MR. GARTNER: Page 238, your Honor, line 9:

"Q Mr. Thaler, if these apprasied values which

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FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

you gave in the last column of these pages represented the value of the piece of equipment as part of the plant in place" --

THE COURT: Wait a minute, I'm lost. 238?

MR. GARTNER: 238, line 9, your Honor.

THE COURT: All right, I have it.

"Q -- represented the value of the piece of equipment as part of the plant in place and in use, why did you add 15 percent for additional in-place value?

"A This represented the cost of trading the machines at the source from which they came abroad, the carting of these machines from their source to the pier, the transportation insurance of these machines from Europe to the United States, the transportation of these machines from the pier to the plant, the removal of the crates from the bases from the skids of the machines, also removing the skids, placing the machines on the floor and possibly having to build foundations to insure that the machines would be level, the engineering and mill right work for the design of this plant for flow, the connection to each machine of electric, air and,where necessary, water.

"Q Well, then, when you say that the appraised values which you listed in the last column of these pages in Plaintiff's Exhibit 2 for identification" -- which is

Plaintiff's 5-A on trial -- "represented the in-place value of these machines, you don't mean that they really represent the in-place value?

"A Yes, they represent" -- interruption --

"Q In what sense does the appraised value which you gave to these machines represent the in-place value when you have just given us a long list of charges and costs which would be necessary in order to get these machines in place?

"A Some of these costs that I indicated to you in my last statement are applicable to the machines themselves, as I have indicated in my appraisal.

"Q I don't understand that. What do you mean?

"Mr. Berman: I don't understand the question.

"Q The question is, what does the last answer mean? You say that some of these costs that you have indicated to me are applicable to some of the machine. Are they not applicable to all of the machine?

"A To all of the machines. And in addition to that is the fact that they were able to be installed and taken out of Switzerland, and the value of these machines in New York was increased by virtue of the fact that they were in New York.

"Q Well, I believe" --

MR. STREAM: Just a second. There was an objection to that question. It was restated at line 25.

MR. GARTNER: Which question are you referring to?

MR. STREAM: The question at line 11 was objected to as to form and it was restated by you at line 25.

MR. GARTNER: Well, I will read it all.

MR. STREAM: No, I object to counsel reading a question the form of which was objected to and is objected to again.

The question was not pressed, your Honor.

MR. GARTNER: Your Honor --

THE COURT: Listen to your adversary, Mr. Gartner.

MR. GARTNER: If your Honor please, I am listening to my adversary.

THE COURT: I have to listen. I can't listen to the two of you. I am listening to him first.

MR. STREAM: Your Honor, lines 11 to 19 on page 240 is a question. That is the question which counsel is about to read, beginning at line 11 and continuing to line 17 -- to line 19.

There was an objection to form and the question was in effect withdrawn because it was restated at line 25.

THE COURT: Well, then, the answer should -- the prior answer should be withdrawn.

MR. STREAM: There is no answer and the question should be withdrawn, too. I suggest that counsel --

MR. GARTNER: I will start on line 25, your Honor.

MR. STREAM: Thank you.

THE COURT: I want to hear what we are going to do now. What are you going to read now, which question are you going to read?

MR. GARTNER: Line 25, page 240, your Honor.

THE COURT: All right, disregard the answer question.

"Q You have testified that the value which you put next to each one of these items represents its in-place value as part of the plant?

"A Yes.

"Q You also testified that you added 15 percent of that value and you have told us that that 15 percent represents transportation costs and installation costs. Isn't there a duplication?

"A No, because the in-place value -- I considered the fact that they were brought into New York under the circumstances in which they were brought and, therefore, were worth that much in place in New York.

"Other than the engineering value and mill right work and so forth, there was a premium, there was a value to having it in place in New York or the United States.

"Q Do you mean that there was an additional value which you added on to what these machines would have been worth in Switzerland?

"A Yes.

"Q When did you add on that value?

"A At the time when I considered the value of these machines in place.

"Q How did you do that? Did you have a figure for the value of the machine in Switzerland and then add it on some increment for its value in New York?

"A Basically the value of this machine was enhanced by the fact that it was in New York, regardless of the mill right work.

"Q I understand that you are saying that the value of the machine was enhanced because it was in New York and that you gave consideration to that enhancement in value, but how did you do it with respect, for example, to a machine which is described as a number 106 jewel staking machine to which you gave a value of $700? What part of that $700 represents the enhanced value because it was in New York rather than in Switzerland?

"A Aside from the cost of transportation and so forth, the fact that it was available in New York, it was worth ten, fifteen, twenty percent, depending on the type of

machine to have it here in New York or in Pennsylvania where it happened to be.

"Q Ten, fifteen or twenty percent. Over what?

"A Over the replacement value of these machines, over the price that you would have had to pay for these machines if you were able to buy them in Switzerland.

"Q What was the replacement value of this 'Schutz' number 106 jewel staking machine at the time that you made your appraisal?

"A You have the figure there.

"Q What was the replacement value?

"A About $900.

"Q Wait a minute. Which item is that? The 'Schutz' number 106.

"A $900.

"Q In other words, you took the figure which was stated by the Hirschmann report as having been the replacement value in 1964 as the replacement value in 1966?

"A Yes.

"Q And you say that this machine was worth ten, fifteen or twenty percent more than the replacement value because it was in New York?

"A The fact that it was available for use in New York or in Pennsylvania where it happened to be, that

was worth a premium.

"Q Did you compute that premium separately?

"A I included it" --

THE COURT: Where are you now? Will you please tell me?

MR. GARTNER: I am reading along at page 343, your Honor?

THE COURT: What line?

MR. GARTNER: Line 19.

THE COURT: You will have to give these lines to me.

MR. GARTNER: I am just reading continuously, your Honor.

THE COURT: Just give them the same, counsel, so I will know. Which lines have you read? Tell me the lines you have read, sir.

MR. GARTNER: Yes, sir, I have read --

THE COURT: 243.

MR. GARTNER: Just on page 243, you want to know, your Honor?

THE COURT: Yes, line 4 is the first question, line 6 is the second question, line 8 is the next one and line 13.

MR. GARTNER: That is where I am, line 13.

THE COURT: All right, pass on from line 13, then.

"Q And you say that machine was worth ten, fifteen or twenty percent more than the replacement value because it was in New York?

"A The fact that it was available for use in New York or Pennsylvania where it happened to be, that was worth a premium.

"Q Did you compute that premium separately?

"A I included it in my evaluation.

"Q How did you include it? Starting with the figure of $900 as the replacement value for this machine, will you please tell me how you arrived at the figure of $700 as its present value in place using this component of enhanced value of some ten or fifteen or twenty percent?

"A I increased the value of this machine by ten or fifteen percent which was included in my figure of $700."

MR. GARTNER: Question on page 244, your Honor, line 4.

THE COURT: Yes.

"Q Do you know whether you increased the value of this particular machine by ten percent or by fifteen percent?

"A Well, no, I just simply used my judgment in making the decision as to how much more it was worth in New York.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

"Q Are you saying that in your judgment it was worth somewhat more, something like ten or fifteen percent in the case of this particular machine?

"A About that.

"Q Ten or fifteen percent more?

"A Yes.

"Q Ten or fifteen percent more than what?

"A Well, I would have evaluated it" --

MR. STREAM: "What."

THE COURT: "What."

"A What I would have evaluated it at if there had not been this difficulty in acquiring the machines and bringing them here.

"Q What would you have evaluated this machine at if there had not been this difficulty?

"A Perhaps ten or fifteen percent less.

"Q Did you actually go through this process of evaluating first ten or fifteen percent less and then adding on ten or fifteen percent?

"A In each case, I evaluated it giving consideration to the fact that it was in New York and it didn't take much to arrive at the figure. I didn't have to use a calculating machine to add what I thought it was worth as a premium to have it here.

"Q Well, now, I am not asking you whether you had to use a calculating machine, Mr. Thaler. I am asking you whether in each case you arrived first at a judgment as to what it was worth before you added on the increment of ten or fifteen percent or whether you did that all in one step.

"A I did it in one step.

"Q You did it all in one step?

"A Sure.

"Q Do you know in each case whether you added 10 percent or 15 percent or 20 percent?

"A No, I can't say for each specific machine how much I added, but I used my judgment as to what a machine like that landed in New York without having to go through the process of being a member of the syndicate and so forth, what it would be worth to acquire in these states in addition or as a premium."

THE COURT: Now, where are we?

MR. GARTNER: Continuing 244, line 23.

"Q In other words, this appraised figure which you gave on Plaintiff's Exhibit 2 for identification represented your one-step judgment of what that particular machine was worth landed in New York?

"A That's right."

MR. GARTNER: Page 249. I want to identify a document, so I will read the colloquy, your Honor. This is on line 17, 249 --

THE COURT: Omit the colloquy, counsel.

MR. STREAM: I will identify it now and then you can mark it in evidence.

MR. GARTNER: It is a letter of October 5, 1966, which was marked Plaintiff's Exhibit 18 on the deposition.

THE COURT: This is Exhibit 16 for identification at the deposition?

MR. GARTNER: No, it is --

MR. STREAM: It was marked Plaintiff's Exhibit 18 in the examination before trial of some witness and I don't mind it being marked directly into evidence.

THE COURT: All right. Let Mr. Gartner take it and offer it, then.

MR. STREAM: I think I have the original.

I ask that counsel mark the original counterpart instead of the Xerox copy.

THE COURT: Very well, mark it in evidence if there is no objection.

MR. GARTNER: No objection, your Honor.

(Plaintiff's Exhibit 13 for identification received in evidence.)

MR. GARTNER: I will just read on page --

MR. STREAM: I would like the whole letter to be read to the jury before we go any further.

MR. GARTNER: If your Honor please, I would like one line read to the jury.

MR. STREAM: Consented to.

THE COURT: Consented to.

MR. GARTNER: I would appreciate it very much --

THE COURT: Look, he is giving you a concession. I don't know why you should not take it.

MR. GARTNER: After he interrupted my statement, your Honor. That is not much of a concession. He has no right to interrupt me this way.

THE COURT: He is facilitating. Take it and read it.

MR. GARTNER: I am not going to take it. I want to read one sentence in which this letter was received and then I will read it, your Honor.

MR. STREAM: Consented to.

THE COURT: All right, he consents.

MR. GARTNER: Page 250, line 5:

"Q Did you receive this letter dated October 5, 1966, Mr. Thaler, which Mr. Berman has just handed to me?

"A Yes, I did."

MR. GARTNER: Now, if the Court please and the jury please, I will read the letter.

THE COURT: This is now the original in evidence, gentlemen, I assume.

MR. STREAM: Yes, sir.

THE COURT: Proceed. Read it.

You may read it.

MR. GARTNER: Mr. Stream has just taken my copy of the letter.

THE COURT: You want the original. The original is what is in evidence, as I understand it.

MR. GARTNER: I have no objection.

THE COURT: I think you can read just as well from an original as the other one.

MR. GARTNER: I just want my other copy back at some time, your Honor.

MR. STREAM: Mr. Gartner is a crybaby.

THE COURT: Disregard that.

MR. GARTNER: I object to these prejudicial comments, your Honor. The man has no right to come up to my table and take my paper and then call me a crybaby.

THE COURT: Wait a minute. Now wait. Why do you want the other, please?

MR. GARTNER: It is my copy of the letter. That

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

is why I want it.

THE COURT: Wait a minute. Which is in evidence?

MR. STREAM: The one he is reading from.

THE COURT: Isn't that the original?

MR. GARTNER: The original is in evidence.

THE COURT: That is the only one that is going to be read.

MR. GARTNER: I don't want to read the other one. I just want my property back.

THE COURT: Okay, give him his letter, but you are not to refer to it.

MR. GARTNER: I don't intend to refer to it your Honor.

THE COURT: I am just telling you. Won't you please listen once in a little while, once in a dog's age.

MR. GARTNER: If your Honor please, I don't understand why your Honor shouts at me this way. I did absolutely nothing. All I did was to ask Mr. Stream to refrain from --

THE COURT: All right, you proceed as I indicated. That's all I want. Then you will be satisfying me.

MR. GARTNER: May I have my copy back.

MR. STREAM: No, sir. Let me tell your Honor what I want to do. I am sure the Court will agree. Let me keep

it while he is reading it to move it along. Then he will give me back my original and I will give him back his letter and everybody will be straigtened out.

MR. GARTNER: This is a man talking about courtesy. He could have asked Mr. Brill to lend him the copy of the letter if that is what he wanted instead of just seizing it from me.

THE COURT: All right, he's borrowed it and now go ahead and read, and then you can get the other and make any other appropriate comments.

MR. GARTNER: Unbelievable I have to be accused of being a crybaby in front of this jury because this man took my copy without the courtesy to ask for it.

MR. STREAM: I will stand on the record.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Now, if we can turn to page 293, your Honor, in the second volume of Mr. Thaler's deposition.

THE COURT: There seems to be somewhat of an overlap, if I am not mistaken.

MR. GARTNER: What seems to be an overlap?

THE COURT: The two books. The big black book and the little black book but we are on page 293 in the little black book.

MR. GARTNER: I'll try to verify it, if your Honor will tell me what you mean.

THE COURT: What page?

MR. GARTNER: 293:

"Q Did you examine the machinery or any of the machinery during the auction?

"A No.

"Q Did you form any opinion about the condition of the machinery?

"A It was in the same condition as when I first observed it, when I made the appraisal.

"Q As the auctioneer moved machine to machine, did the entire group of potential buyers go with him?"

MR. STREAM: Just a second. I now renew my objection on the grounds of irrelevancy, incompetency and immateriality.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

THE COURT: As to Question 7?

MR. STREAM: Yes, sir, and the succeeding questions, one at a time, however.

MR. GARTNER: Well, your Honor, this relates to the --

MR. STREAM: Sale.

MR. GARTNER: The condition of the machines.

THE COURT: What is the objection? Form or substance?

MR. STREAM: I object on the grounds that it is irrelevant to this cause of action.

MR. GARTNER: I suggest, your Honor, that it is important to establish that the machines that were sold at the auction were the same items that were appraised.

THE COURT: He's conceded it above.

MR. STREAM: We concede it. We concede it.

THE COURT: The objection is sustained to Question 7. Proceed.

MR. GARTNER: Your Honor, I think it is prejudicial not to allow me to read Mr. Thaler's own testimony.

THE COURT: I have ruled, counselor, and I don't want any further comments about rulings. Time doesn't permit it, among other things, and it isn't necessary, in

(During the reading of the testimony of Mr. Thaler by Mr. Gartner, the following occurred):

"Q Did you have any other communication from or to Ajax after the auction?

"A Yes.

"Q May I see it, please?

"A Yes. (Handing)

"Will you please mark a letter dated February 29, 1968, as Plaintiff's Exhibit No. 26 for identification."

Now that is a letter --

THE COURT: Well, do you want to offer it here?

MR. GARTNER: Yes. I want to offer for identification a letter dated --

THE COURT: Any objection to the letter, Counselor?

MR. STREAM: May I see it, please?

THE COURT: Show it to him--Mr. Stream, please, save coming up to the-- well, all right.

MR. GARTNER: Can't I ever finish a sentence, your Honor? I was trying to say, for the record --

THE COURT: I thought you were through, Counselor. I can't discover all the periods in your statements.

MR. GARTNER: I think, your Honor, it is perfectly plain I had not finished the sentence.

SOUTHERN DIS[illegible] COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. [illegible]

I said "I wanted to offer a letter dated" and your Honor interrupted me.

THE COURT: Bring it up here and have it marked for identification. That's the process.

MR. GARTNER: I think it is proper to give the date of the letter.

THE COURT: It isn't necessary. It will appear on the letter if it is admitted. You will save time thereby.

Now please do as the Court suggests. It is merely a suggestion.

xx (Plaintiff's Exhibit 14 marked for identification)

MR. GARTNER: In that tone, your Honor, I am afraid it is more than a suggestion.

THE COURT: There is no tone.

You may disregard my tone, members of the jury. I am trying to facilitate this trial.

MR. GARTNER: I offer Plaintiff's Exhibit 14 in evidence, your Honor.

MR. STREAM: I object to it. It is not the best evidence.

I offer to counsel the original counterpart and suggest it be marked in its place.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

THE COURT: I'll take the original.

MR. STREAM: And I am going to hang on to the copy so I have something to work with, with the Court's permission.

MR. GARTNER: If your Honor please, I am not offering the envelope which-- why is your Honor throwing your book down?

I am not offering the envelope.

THE COURT: I didn't say anything about the envelope. You are the one that mentioned it first.

MR. GARTNER: Mr. Stream has just handed this to me with an envelope attached.

THE COURT: You don't have to worry about that. He is not suggesting that you take that. He is suggesting that you take the original, without the envelope.

MR. GARTNER: This is the original,your Honor, with the envelope.

MR. STREAM: If he doesn't want to use the envelope, he can tear it up. I don't care. It doesn't matter to me.

THE COURT: Take it off, then.

MR. STREAM: Unbelievable.

THE COURT: Then there will be no disagreement.

MR. GARTNER: You may want the envelope, Mr. Stream. (Handing)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jb:mg 4 "Thaler"

THE COURT: Have it marked for identification.

MR. GARTNER: This is to be marked as Plaintiff's Exhibit 14A, please.

(Plaintiff's Exhibit 14A marked for identification)

MR. STREAM: I consent that it be received.

THE COURT: Mark it in evidence.

(Plaintiff's Exhibit 14A received in evidence)

MR. GARTNER: It is a letter dated March 14, 196 addressed to Mr. David Kriser, President, Industrial Plants Corporation, 211 East 43rd Street --

THE COURT: A little louder, please.

MR. GARTNER: I am sorry, your Honor.

-- 211 East 43rd Street, New York, New York.

"We have not communicated with Industrial Plants, Mr. Kriser, since our exchange of correspondence on February 26th and 29th and March 8th, 1968, because we were undertaking to determine the precise extent of the damages sustained by Ajax as a result of the gross error contained" --

MR. STREAM: Just a second. Excuse me.

These two letters are not the same.

May I hold this for a second, please?

MR. GARTNER: You gave this to me,Mr. Stream.

jb:mg 5 "Thaler"

MR. STREAM: May I please hold it for a minute? Your Honor, I gave him the wrong letter.

THE COURT: Well, he made a mistake.

MR. STREAM: It only shows that I am human. I gave him a letter dated March 14, instead of February 29th.

THE COURT: Get the right one, Counselor.

MR. GARTNER: If counsel would not interrupt me while I am putting in my evidence, he wouldn't make those mistakes.

THE COURT: I have no comment and I want none from counsel about this. This must stop.

MR. GARTNER: Well, I wish it sould stop,your Honor. There is nothing I can do to stop it.

THE COURT: You can stop half of it or one-third of it.

MR. GARTNER: I can't stop any of it. I am the one that is being interrupted.

MR. STREAM: With the Court's permission, may we ask that the correct ribbon copy of Plaintiff's Exhibit 14A be marked by simply substuting the marked one.

THE COURT: Well, does he agree?

MR. STREAM: I'll show him the original and the copy.

SOUTHERN DISTRICT REPORTERS U.S. COURTHOUSE

THE COURT: He is trying to correct the record.

MR. STREAM: I am astonished he didn't know that he was reading--

MR. GARTNER: He is commenting that it is my fault that he is astonished that I didn't know that he gave me the wrong letter.

It is absolutely incredible. Everything that is happening in here is put on my shoulders.

THE COURT: We will take a little recess, Counselor, now.

MR. GARTNER: He is astonished that I didn't know it.

THE COURT: I would like to see counsel in the robing room with the reporter.

(In the robing room)

THE COURT: Please be seated.

Now, I want to say this, Mr. Gartner, first, to you: If you go on this way I shall consider lodging contempt charges against you during the course of this trial. You simply cannot control yourself and you repeatedly disobey my instructions as to making comments and arguing as to rulings.

And I shall do the same if the case arises with Mr. Stream. I don't think it yet arises. He is attempting

SOUTHERN DIS... COURT REPORTERS U.S. COURTHOUSE

to cooperate in the submission of the papers and the exhibits and I have said what I have said.

Now, that is all, gentlemen.

MR. GARTNER: May I comment, your Honor?

THE COURT: Oh, you may, if you want to say something.

MR. GARTNER: First, I respectfully apologize to the Court for the--

THE COURT: Well, you lost your temper.

MR. GARTNER: Well, of course, I lost my temper.

THE COURT: Why do you say "of course"?

MR. GARTNER: Because Mr. Stream deliberately interfered with my introduction of my own exhibits and handed me another copy which your Honor then ruled could be marked in evidence.

THE COURT: All right.

MR. GARTNER: When I started to read from it Mr. Stream, in the presence of the jury, said that he was astonished that I had not noted that the letter which he gave me was not the proper letter and that I should not have started reading from it.

THE COURT: Well, that is an appropriate remark.

MR. GARTNER: I don't think it is an appropriate remark, your Honor. I don't think that is an appropriate

jb:mg 6

remark.

THE COURT: He is merely attempting to correct a paper which he had given you.

MR. GARTNER: If he had--

THE COURT: Wait a minute. I am not going to listen one bit more. We will proceed and keep in mind what I told counsel.

MR. GARTNER: Your Honor, I most respectfully dissent from what your Honor is saying.

THE COURT: All right. Your dissent is on the record. The record will speak for itself.

Close that door.

MR. GARTNER: I think the record will speak for itself and I think proper inquiry--

THE COURT: I'll rest on the record, Counselor.

MR. GARTNER: Well, I am prepared to rest on the record, too.

THE COURT: Go ahead and see if you can control your temper. You certainly lost your temper there. Now you are telling me you had to lose your temper.

MR. GARTNER: Your Honor, I did not lose my temper. I was simply responding to what Mr. Stream had said, that he was astonished that I was reading from a paper which he himelf handed me..

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

THE COURT: He thought you would see the error.

MR. GARTNER: How would I see the error? If he would stop interrupting me--

THE COURT: I won't listen to any more. Get out there now and we will attempt to go on.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

(In the courtroom, jury present.)

THE COURT: We will go on to a quarter to one.

MR. STREAM: With the Court's permission, I would like to have the clerk of the Court attach the marker for Plaintiff's Exhibit 14-A to the correct letter, namely, the ribbon counterpart of Plaintiff's Exhibit 14 for identification.

MR. GARTNER: I object to that, your Honor. The letter was offered and accepted in evidence and I would ask that the other letter be marked Plaintiff's Exhibit 15 and that the letter which is already in evidence remain in evidence.

THE COURT: Let me see it. I thought you had agreed on something.

MR. STREAM: I thought so, too, in the light of the comment by counsel --

THE COURT: Just a minute, Mr. Stream.

What exactly do you want to do now?

MR. STREAM: I handed to counsel a ribbon copy of the wrong letter. I handed him the one marked 14-A, thinking that it was the ribbon copy of Exhibit 14 and it wasn't.

I now gave him the proper ribbon copy of 14.

THE COURT: Is that 29?

MR. STREAM: That's the one you have, Judge, and I would like to have the exhibit correctly marked and I would like to get back the wrong letter which I shouldn't have given him. It was just a mistake.

THE COURT: Now, wait a minute, Mr. Gartner. Come up here and show me which letter you are talking about. They both appea to be 29.

MR. GARTNER: May I, your Honor?

THE COURT: I am trying to find out what Mr. Stream wants me to do. Will you wait just a minute, please?

MR. GARTNER: I thought you asked me.

THE COURT: No, I did not ask you.

MR. STREAM: Your Honor, 14 for identification is this letter --

THE COURT: That is the mistaken letter you handed?

MR. STREAM: No. I handed counsel -- I meant to hand counsel the original of Plaintiff's Exhibit 14 for identification --

THE COURT: Which one is it?

MR. STREAM: The one that you now have in front of you is the ribbon copy. By error I handed him a letter which was not the ribbon counterpart. It is a different

letter and the clerk attached 14-A to it and I am asking the Court for leave to substitute the right letter.

THE COURT: This one here?

MR. STREAM: That's right, your Honor.

THE COURT: Why should there be an objection to that?

MR. GARTNER: I do object and I think both should be in evidence and since 14-A is already in evidence, we simply have to mark the other one as 15.

MR. STREAM: Since I marked the other in error, I ask the Court to suppress it at this time. It may go in during the defendant's case.

THE COURT: Who offered 29?

MR. GARTNER: There is no 29.

THE COURT: Who offered this one?

MR. GARTNER: Mr. Stream offered it, gave it to me.

MR. STREAM: May I start over, so we straighten this out?

THE COURT: Yes.

MR. STREAM: Counsel handed to the Court this Xerox copy of a letter dated February 29th and he had it marked 14 for identification.

THE COURT: Mr. Gartner.

MR. STREAM: Mr. Gartner did that. He then

offered it in evidence and I said I object, I have the original. Let's use the original of that and I fetched it in my file and I picked out the wrong original.

It is a different letter and quickly he marked it 14 in evidence and started to read it to the jury and I said, please, it is the wrong letter.

THE COURT: 14-A was the mistaken letter?

MR. STREAM: That's right and I want to get it back.

THE COURT: You want to withdraw it?

MR. STREAM: Yes, sir.

THE COURT: Withdrawn.

MR. GARTNER: I respectfully object.

THE COURT: Overruled.

MR. STREAM: I now offer to counsel the ribbon counterpart of 14 and consent that that be marked as the exhibit to be read to the jury.

MR. GARTNER: I think it should be marked separately as Plaintiff's Exhibit 15.

THE COURT: Make it 15, then.

MR. GARTNER: And the other marker should remain on the other letter.

MR. STREAM: The other one is being marked off.

THE COURT: It is withdrawn.

MR. GARTNER: It may be withdrawn from evidence but it is marked as 14-A for identification.

THE COURT: I have ruled. Now proceed as I just stated, counselor.

MR. GARTNER: Would you please mark this letter as Plaintiff's Exhibit 15?

xxx

(Plaintiff's Exhibit 15 marked for identification.)

THE CLERK: And received?

MR. STREAM: You are putting it in evidence?

MR. GARTNER: Yes.

MR. STREAM: Is that the ribbon copy?

MR. GARTNER: You better look again. Maybe you made another mistake.

MR. STREAM: Yes. This is the right one.

THE COURT: You don't have to make that comment.

MR. STREAM: This one is the right one and I consent.

THE COURT: Give it back to the reporter to be marked in evidence.

xxx

(Plaintiff's Exhibit 15 for identification received in evidence.)

THE COURT: Now, are you through with the deposition yet?

MR. GARTNER: Not quite, your Honor. I would like to read this letter which has just been put in evidence.

THE COURT: All right.

MR. GARTNER: February 29, 1968, Mr. Jesse Thaler, Vice President, Industrial Plants Corporation, 211 East 43rd Street, New York, New York.

"Your letter, Mr. Thaler, of February 27, 1968" --

MR. STREAM: Can I borrow your copy of this?

MR. GARTNER: Yes.

"-- addressed to Howard Klein and my letter of February 26, 1968, addressed to Mr. Kriser, apparently crossed in the mail. I presume by this time you have seen my letter and understand our position.

"Unless you have other plans which you which to propose, I suggest you pass on this information that you mentioned in your letter to Mr. Irv Richland, the Richland Company, 32 Joyce Road, Plainview, Long Island, New York, phone 516-935-6137, who is handling the sale of the equipment.

"Under the circumstances, in view of the fact that Richland is handling this, there may be some way he can work something out with these people in a split commission. Therefore, unless you wish to take over the

equipment in its entirety and handle the sale thereof, which is agreeable, we might as well handle it all through Richland.

"If you disagree with my thoughts or feel there is a better way of handling this matter, please let me hear from you and I will arrange some other format for the sale of this equipment. I suggest you write directly to me, since I will be handling this matter from now on.

"Very cordially yours, Norman Lewis, President."

The next question on 299, line 20:

"Q Do you have the letter of February 27th from Mr. Lewis to Mr. Kriser which is --" I'm sorry, your Honor. It is line 11.

"Q Do you have another letter?

"A Yes (handing)."

MR. GARTNER: Mr. Thaler has produced another letter from himself to Mr. Lewis dated March 8, 1968.

Will you please mark that as Plaintiff's Exhibit No. 16 for identification

And I would offer that letter as Plaintiff's Exhibit 16.

xxx (Plaintiff's Exhibit 16 marked for identification.)

MR. GARTNER: I offer it in evidence, your Honor.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

MR. STREAM: I have no objection.

THE COURT: Mark it in evidence.

xxx (Plaintiff's Exhibit 16 for identification received in evidence.)

MR. GARTNER: This is dated March 8, 1968, Mr. Norman D. Lewis, President, Ajax Hardware Manufacturing Corp.:

"Dear Mr. Lewis: This will acknowledge your letters dated February 26th and the 29th. You undoubtedly know that the writer met with your Mr. Klein in New York recently. He informed me that the remaining machines and equipment had to be removed from the plant in Strasburg. He also requested that we advise him as to which machinery dealer would be best qualified to handle the sale of same on a piecemeal basis.

"Since we do not have a warehouse nor do we stock machinery, we contacted several dealers, both on the West and East Coast. We finally agreed on the Richland Company with whom Mr. Klein made a deal. We shall do all we can to assist Richland in making some arrangements with HIMETCO S.A. for the sale of some of this equipment on the Continent.

"We regret that the result of the auction sale was not what we anticipated in spite of our efforts.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

"A We were to get one percent of the first -- I don't quite remember -- one percent of the first $100,000, a half percent of the next $250,000 -- $200,000 or $250,000 -- and a quarter beyond that."

THE COURT: Will you slow down a little bit in your reading?

MR. STREAM: Yes, your Honor.

"Q A quarter of a percent beyond that?

"A Yes.

"Q What kind of an appraisal did Mr. Klein ask you to make?

"A The value of the plant in place and ready for operation, continued operation.

"Q Do you recall anything else in your conversation with Mr. Klein?

"A Yes.

"Q What was that

"A He impressed me with the urgency of doing this appraisal because they were then in the process of negotation with the government for the production of fuses.

"Q Who was in the process of negotiation?

"A Ajax.

"Q This was not Ajax's plant, was it?

"A Not yet. I don't believe. I don't know

that part it. Ajax was negotiating for the purchase -- sorry. Ajax was negotiating this contract with the government to produce and they wanted to know what the value of the plant was as an operating business.

"Q Did Mr. Klein explain to you why it was necessary for them to know the value of the plant in connection with their negotiations with the tovernment?

"A I believe there was a question of financing.

"Q In what sense was there a question of financing?

"A They were going to borrow money on the strength of the dollar value that was placed on the plant.

"Q Ajax was going to borrow money?

"A Yes.

"Q Did you inquire of Mr. Klein or did he tell you the relationship between Precision Time and Ajax?

"A The only thing that I knew was Ajax was acquiring this plant from Precision time."

MR. STREAM: Page 37, line 9.

"Q Is that the purport of your recollection of the conversation that you were told --

MR. GARTNER: Excuse me. Could I have the page and line again?

THE COURT: 37, line 9.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

"Q Is that the purport of your recollection of the conversation, that you were told that Ajax was going to --

MR. STREAM: Can I perch up here, judge, without being offensive to anybody?

THE COURT: Oh, I don't object.

"Q Is that the purport of your recollection of the conversation, that you were told that Ajax was going to engage in some form of financing with respect to the machinery of the Precision Time Company and that that is why they wanted the appraisal?

"A It was not only the machinery; it was the plant in its entirety as an operation fof the production of fuses.

"Q Is that the best of your recollection of the entire conversation that you had with Mr. Klein?"

MR. GARTNER: Excuse me, your Honor. I don't want to seem uncooperative but Mr. Stream is sitting right over me here and it is very uncomfortable.

THE COURT: Well, if you object. He asked if you objected.

MR. GARTNER: I didn't want to object at the time.

THE COURT: Now you have objected and now he has moved.

MR. GARTNER: Thank you.

MR. STREAM: Line 17, page 37.

"Q Is that the best of your recollection of the entire conversation that you had with Mr. Klein?

"A He said that he realized that the time allotted to me to make this appraisal was indeed very short and that to help me in making this appraisal, he would provide me with an appraisal that formerly had been made by another company. Also, that he would have a Mr. Haakenson, who was to be the vice president in charge of manufacturing of Time and Micro, which it became --

"Q Time and Micro was what?

"A The new name for Precision Time.

"Q The company to which you have been referring is Precision Time?

"A That was the original name.

"Q It was then known as Time and Micro?

"A Yes."

MR. STREAM: Line 16.

"Q You say that he told you something about Mr. Haakenson?

"A He was to be there to be the man in charge of production of the fuses, would accompany to help me because he was very familiar and knowledgeable with the

workings of a plant like that, together with the machine tools that were required to produce the fuses that they were negotiating to manufacture.

"Q You said that Mr. Klein said something about being conscious of the shortness of the time allotted. What did you mean by that?

"A That in order to help me do this appraisal --

"Q I'm sorry; you misunderstood me. What was the time allotted and who allotted it?

"A It was moved up from approximately a week to the next day, I believe, to make this appraisal. In other words, they wanted this appraisal four or five days earlier than my first discussion with Mr. Klein.

"Q Did all this occur at the same discussion with Mr. Klein?

"A Yes.

"Q In other words, when you responded that you would prppose to make the appraisal within a week --

"A Right.

"Q -- Mr. Klein asked that you make it earlier.

"A As a matter of fact, I recall now that he called me and said that he would like to have this done the next day; it was originally one week.

"Q Let's see if we can confine ourselves to

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

each separate conversation. At the time that you met with Mr. Klein in Mr. Shriro's office, you indicated that you would make the appraisal in a week?

"A Yes."

MR. STREAM: Then the deposition continued with questions which have been already read, so we can pass to page 43, your Honor, continuing with the examination by Mr. Gartner of Mr. Jesse Thaler.

May I have the appraisal, sir?

Will counsel stipulate that at this point in the deposition on the top of page 43 that what I hold in my hand, Plaintiff's Exhibit 12 is what is being referred to at this point in the transcript?

MR. GARTNER: Yes.

MR. STREAM: Question at line 3 on page 43.

"Q It is your testimony that you were given this" -- referring to Plaintiff's Exhibit 12 in evidence -- "by Mr. Klein at the meeting in Mr. Shriro's office that you have testified about?

"A Yes, to the best of my recollection."

MR. GARTNER: Excuse me, your Honor. That exhibit, however, contains other tapes which were not given to him. I think Mr. Stream will stipulate to that.

MR. STREAM: Yes. I will stipulate that when the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 791-1020

witness, Mr. Thaler, got this exhibit, it was minus the fed figures and minus the tapes.

MR. GARTNER: And minus the tapes.

THE COURT: All right.

"Q Was it handed to you or was there any covering letter with it or anything like that?

"A I believe that he handed it to me at the time for the reason that I wanted time for the purpose of familiarizing myself more with the type of equipment that was there, which would have required perhaps two weeks in order to be able for me to come up with the proper places with the market prices, so he said 'We can help you with that; I have an appraisal here which was made by Hirschmann and Company; they are the importers of this equipment; they handle this equipment; they are very qualified to establish a value of this equipment.'

"And then he also said, 'We will have to, because of the shortness of time, we will have Mr. Haakenson accompany you and you can rely on him because he is very familiar with this equipment and this would save time, since we need this information very quickly.'"

MR. STREAM: Line 25.

"Q Mr. Thaler, was Mr. Klein handing you this Exhibit 12 in evidence as an appraisal or as simply a

list of the equipment which he wanted you to appraise?

"A It was a list of equipment and on it was the appraisal that was made by this company.

"Q I understand that but did Mr. Klein tell you that you should rely upon the appraisal which the other people made?

"A He said, 'We want this appraisal upgraded,' and I can rely on the appraisal made by Mr. Hirschmann. I forget his name -- the president of the company."

MR. GARTNER: Excuse me, your Honor. I think Mr. Stream should continue to read the following questions through to the next page.

THE COURT: Well, maybe he is going to.

MR. STREAM: I am going to do that.

MR. GARTNER: Well, I heard him turning the pages.

MR. STREAM: Just looking ahead to see where it ended. Continuing on page 44.

"Q He told you that you could r ely on the appraisal that was made by Mr. Hirschmann?

"A Yes. So that to save time, so as to save time in establishing the value, since it was more or less of a special nature.

"Q What did he want you to do?

"A Upgrade it.

"Q What did that mean to you, upgrade it?

"A To see whether the values as of the date of my appraisal, what the value would be as of the date of my appraisal.

"Q In other words, he wanted you to give him your opinion as to what the value was as of the date of your appraisal?

"A Yes."

MR. STREAM: Your Honor, on page 53 at line 21.

"Q And are all of these other sheets" -- referring to Plaintiff's Exhibit 21, your Honor, the Hirschmann appraisal --

MR. GARTNER: Plaintiff's Exhibit 12.

MR. STREAM: I am sorry. It's 12, not 21.

"Q And are all of these other sheets in the same order in which he gave them to you?

"A I believe so. Certainly the inventory.

"Q The inventory numbers?

"A Yes.

"Q They are in the same order?

"A Yes.

"Q Some of these sheets are pasted onto ledger sheets. Were those ledger sheets --

"A I had them put on so as to preserve them.

"Q So that initially those ledger sheets were not part of what he gave you?

"A No."

MR. STREAM: On page 61, your Honor, line 4, and Mr. Gartner is still referring to the Plaintiff Exhibit 12 in evidence and particularly to certain sheets in it which we will get to in this question.

"Q Mr. Thaler, there is a copy of a letter here on the stationary of the Hirschmann Corporation, addressed to Mr. Jacob Shriro and to that is pasted a card of Mr. Howard Klein.

"A Yes.

"Q Were both of those papers given to you at the same time as the Hirschmann report?

"A Yes."

MR. STREAM: Will counsel stipulate that I have opened the report to precisely those pages?

MR. GARTNER: Yes. But do you intend to continue the reading?

MR. STREAM: Thank you.

"Q Were they attached to the Hirschmann report?

"A I don't recall."

MR. STREAM: On page 62, now, your Honor.

"Q Mr. Thaler, have you given us your complete recollection of your conversation with Mr. Klein that first time in Mr. Shriro's office?

"A I think I have, based on what I said. I think that there is nothing that I can add to it with the exception that he again reiterated the fact that he was most anxious to have this done as quickly as possible and that he would render all assistance based on the appraisal that was made, which I could rely upon, so as not to have to wait two weeks or three weeks in order for me to ascertain certain values that I could rely on the information that he gave me in respect to Mr. Hirschmann's appraisal as well as H. akenson's appraisal, that these were qualified men, that in order to expedite things, that I should rely completely on what they said.

"Q As I understand it, at the meeting in Mr. Shriro's office, your offer was to conduct the appraisal within a week or begin the appraisal within a week.

"A Yes.

"Q And when that meeting had concluded, that was the basis upon which you left it? In other words, that you were to conduct the appraisal, to begin the appraisal approximately a week after?

"A Approximately a week after my meeting."

MR. STREAM: Page 68, your Honor, at line 21:

"Q What appraisal did Mr. Klein ask you to make? That is, did he ask for an individual value for each piece of equipment or did he ask for an entire price for the entire plant or did he ask for replacement value or did he ask for a liquid value? What kind of an appraisal did he ask you to make?

"A He asked for a market value appraisal of the plant intact, in-place, ready for operation.

"Q And is that all he asked for?

"A At that time, yes.

"Q Do you mean at the meeting with Shriro?

"A Right.

"Q Did he ever ask for anything more?

"A Yes. Subsequently he wrote and asked me to give him an opinion as to what it would be worth if they had to sell it at public auction."

MR. STREAM: Now, your Honor, to page 72 -- as a matter of fact, I am going past that page.

MR. GARTNER: If your Honor please, I think for clarity, page 72 should be read. It refers to the alleged subsequent request to move up the appraisal.

MR. STREAM: Well, your Honor, counsel for the plaintiff has read what he wanted and he did not read it and

"Q Do you remember the day on which you met him, meaning Mr. Haakenson?

"A The day of the appraisal."

MR. STREAM: Next, 81, line 11:

"Q Was that date August 15, 1966?

"A The date of the inspection, right."

MR. STREAM: Now on page 82, your Honor, line 3:

"Q When you met Mr. Haakenson at the Wall Street Heliport, did you have a conversation with him about the appraisal?

"A Naturally we talked about what we were going to see."

MR. STREAM: Now the question at line 19:

"Q Did you have" --

MR. GARTNER: I don't think he should skip the intervening question.

MR. STREAM: It has been read to the jury, your Honor.

THE COURT: You read it, counselor.

MR. GARTNER: In context it doesn't make sense.

MR. STREAM: I'll read it over again:

"Q What did you say and what did he say?

"A Well, he told me that what I am going to see was a highly precision plant that was originally designed

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and engineered to produce precision watch work and that the plant is presently shut down, it was presently shut down and it was th esire of the Ajax Company to utilize the plant which Mr. Haakenson was quite familiar with, to advise him that the equipment contained in this plant was in principle the kind of machinery that they would require in order to make the fuses for the Government.

"Q Did you have any other conversation about the kind of appraisal that you were to make?

"A No. I knew what kind of appraisal I was to make and it wasn't anything that I would discuss with him. But he did say to sort of acquaint me with the situation, although I knew myself, how difficult it was, it would have been, to accumulate all of this equipment in one plant in time for Ajax or whatever the name of the -- or whatever other name of the corporation that was then making fuses, to acquire this equipment, put it into a plant and to use it. The great and important factor in this was that this was ready for operation."

MR. GARTNER: "For an operation."

MR. STREAM: Page 97, your Honor, line 24:

"Q Referring to the day of the appraisal, which is August 15, 1966, was there any break for lunch?

"A We couldn't afford to take any time for lunch

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FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

because of the urgency of getting this information to Mr. Klein that day."

MR. GARTNER: I am sorry. Did you say line 24?

MR. STREAM: Yes, sir, page 96, line 24.

MR. GARTNER: I think you said 97.

THE COURT: You read number 14.

MR. STREAM: I beg your pardon.

THE COURT: All right.

MR. STREAM: I started on line 24 of page 96 and I'll start there again to keep the continuity:

"Q Was there any break for lunch?

"A We couldn't afford to take any time for lunch because of the urgency of getting this information to Mr. Klein that day."

MR. STREAM: Then skip down, if you will, to line 11:

"Q Is that the way in which the entire day was spent? You say from nine o'clock in the morning until ten o'clock at night?

"A There was no break in your making of the survey.

"Q And therefore, Mr. Thaler, you spent approximately, give or take an hour, thirteen hours?

"A About that, at the plant.

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xxx

(Defendant's Exhibit N-1 was received in evidence.)

MR. STREAM: Your Honor, I will defer reading it until summation. I don't need it now.

THE COURT: You are on line 13?

MR. STREAM: Yes, sir. I think I am going to skip a little bit again.

THE COURT: All right, there is no law against that.

MR. GARTNER: I guess the law has been amended, your Honor.

MR. STREAM: I want to skip to page 210, your Honor, at line 21:

"Q Mr. Thaler, have you ever rendered an appraisal of the value of an entire plant as a going concern for any company?

"A Is that the end of your question?

"Q Yes.

"A Yes.

"Q When did you do that?

"A On many occasions. At the moment, I can't recollect."

MR. STREAM: Continuing with the answer:

"As a going concern, you mean as an in-place

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FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

value, not broken up into individual machines?

"Q Yes, have you ever done that?

"A Yes.

"Q Were you specifically asked by the particular client to do that kind of an evaluation?

"A Yes.

"Q Did you render written reports of such an appraisal?

"A There are times when I made reports of the values of the plant as an in-place facility and in use."

Now, your Honor, I would like to turn to Volume 3.

MR. GARTNER: Your Honor, I think that Mr. Stream should continue reading at that point for clarity. The subject goes on.

MR. STREAM: I don't choose to read for clarity and I want the right to continue to read in my own sequence so this jury understands my side.

THE COURT: You have a right to read in your own sequence but if there is a reasonable requirement, I will direct it, as I said before. I don't think it is necessary --

MR. GARTNER: It goes on.

THE COURT: Yes, it goes on. I don't think it is

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FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

necessary. Now, that's it.

MR. GARTNER: It is the same line of questioning, your Honor.

THE COURT: You can read it later.

MR. GARTNER: All right, I will take your Honor up on that. Thank you.

THE COURT: Is this the --

MR. STREAM: It is the third volume, your Honor. I want to read one page of it.

THE COURT: That is the second, another black volume.

MR. STREAM: Page 328, your Honor.

THE COURT: All right. Very well. What line?

MR. STREAM: The reference -- will counsel stipulate that the Mr. Carter to whom reference is made on that page is a member of his firm and was conducting the deposition on that date, which was September 22, 1970?

MR. GARTNER: No. I will stipulate that Judge Robert Carter who was a member of my firm is now a judge of this federal court.

THE COURT: Well, was he counsel at this time? We are not concerned with what he is now.

MR. GARTNER: He was at that time a member of my firm.

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FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

MR. STREAM: No objection to the introduction or receipt of 18 in evidence

XXXXX

(Plaintiff Exhibit 18 received in evidence.)

MR. GARTNER: It is on the letterhead I --

THE COURT: Before we go on, gentlemen, Mr. Gartner, will you kindly give the reporter your deposition which you have marked?

MR. GARTNER: Yes, your Honor; here it is.

THE COURT: Are the other marks on for Mr. Stream's questions?

MR. STREAM: Yes, sir.

THE COURT: All right. He doesn't need it now. Go ahead with this flood of exhibits, if you can.

MR. GARTNER: Your Honor, Mr. Stream, by raising this question about exhibit 17, reminded us that this exhibit was not read before the recess. It was introduced in evidence but it wasn't read, so I would like to read it now.

THE COURT: All right. We'll listen to the reading, too, as long as we have to.

MR. GARTNER: Well, I am sorry your Honor is so long-suffering but --

THE COURT: I think some of these things -- I am frank to say some of these things are not too material;

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

they may or may not be. I'll let the jury judge.

MR. GARTNER: I think the jury should decide that.

THE COURT: They are going to. I just said I would let them decide it and then you question me about it.

MR. GARTNER: Your Honor --

THE COURT: Go ahead and read it.

MR. GARTNER: To say that a document is not material even before I read it is prejudicial, your Honor.

THE COURT: I don't say it is not material. I said I would let the jury decide it. Now they are entitled to hear it.

MR. GARTNER: Thank you, your Honor.

(Mr. Gartner read Plaintiff Exhibits 17 and 18 to the jury.)

MR. GARTNER: The next document I would like marked is this continuing guarantee.

XXXXX

(Plaintiff Exhibit 19 marked for identification.)

MR. STREAM: Your Honor, we have stipulated to mark in evidence, and I want to be sure that this is on the record, certain documents. The Court remembers that in chambers -- what counsel is doing now is to begin to offer them singly. I don't object, as long as he goes through the whole package.

MR. GARTNER: Of course I will.

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MR. GARTNER: The next document is a promissory note for $270,000.

XXXXX (Plaintiff Exhibit 21 marked for identification.

THE COURT: No objection to that, is there, Mr. Stream?

MR. STREAM: I just want to see it. I have a copy of it.

I would like counsel to be good enough to read into the record the signatories on this promissory note and then I will consent to it.

THE COURT: First has it been marked?

MR. STREAM: Yes. I accept it. I have no objections to it.

XXXXX (Plaintiff Exhibit 21 received in evidence.)

(Mr. Gartner read from Plaintiff Exhibit 21 to the jury.)

MR. GARTNER: The next two documents should be marked separately, your Honor. One is the payoff of the Time and Micro Instruments loan.

XXXX (Plaintiff Exhibit 22 marked for identification.)

MR. GARTNER: Mark this number 23, please.

XXXXXX (Plaintiff Exhibit 23 marked for identification.)

MR. GARTNER: 23 is for the purchase of machinery held --

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

THE COURT: You don't need to tell what they are. Show them to Mr. Stream.

MR. STREAM: No objection, your Honor.

THE COURT: Mark them.

XXXX

(Plaintiff Exhibits 22 and 23 received in evidence.)

(Mr. Gartner read from Plaintiff Exhibits 22 and 23 to the jury.)

THE COURT: Do you have more left?

MR. GARTNER: Yes. The next document is subrogation receipt.

THE COURT: I am going to declare a recess as soon as we get through with these.

XXX

(Plaintiff Exhibit 24 marked for identification.)

MR. STREAM: Consented.

XXX

(Plaintiff Exhibit 24 received in evidence.)

(Mr. Gartner read from Plaintiff Exhibit 24 to the jury.)

MR. GARTNER: The next document --

THE COURT: How many more are there, counsellor?

MR. GARTNER: I believe four more, your Honor.

THE COURT: I think no one would object to taking a recess. We'll have a recess.

(Recess taken.)

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THE COURT: You may complete the four exhibits -- I hope.

MR. GARTNER: I'll offer three at once. Could they be marked separately, please?

THE COURT: Mark them separately for identification. That is what I was trying to get you to do before the recess.

MR. GARTNER: I have been trying to get Mr. Stream to give me the original and he hasn't given it to me.

THE COURT: All right. Now you have them all.

MR. GARTNER: No; he hasn't given them to me.

MR. STREAM: I have no idea what they are. I haven't the foggiest.

THE COURT: He can't give them to you if he doesn't know what you mean.

MR. GARTNER: I asked him for the auction sheets five times and he refused to give them to me.

(Plaintiff Exhibits 25, 26 and 27 marked for identification.)

THE COURT: Before we go on will you state to him on the record, will you write down, what exhibits you want?

MR. GARTNER: I asked for --

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

THE COURT: Not what you asked. State it now, please.

MR. GARTNER: Well, your Honor, you made a statement on the record that I had not asked Mr. Stream for it before and I think it is necessary to correct the record.

THE COURT: All right. You have. I will assume that you have.

I want to proceed now with your statement as to what ones you need so he can get them for you.

MR. GARTNER: At this point, I don't need it. I am using a copy, your Honor.

THE COURT: If you don't need it, there are no others that you want, is that correct?

MR. GARTNER: Not at this point, your Honor.

THE COURT: All right. At this point. This point isn't going to last forever.

MR. GARTNER: I offer for Mr. Stream's examination Plaintiff's Exhibits 25, 26 and 27 for identification.

MR. STREAM: Consented to.

(Plaintiff Exhibits 25, 26 and 27 received in evidence.)

MR. GARTNER: The last exhibit I want to offer is a calendar for 1966.

(Plaintiff Exhibit 28 marked for identification.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

MR. STREAM: Consented to.

(Plaintiff Exhibit 28 received in evidence.)

THE COURT: That's one that went fast.

MR. GARTNER: Nobody can dispute the stars in their courses and --

THE COURT: I don't know about the stars. That's another subject. That's astronomy.

MR. GARTNER: Your Honor, the plaintiff rests.

THE COURT: All right. Plaintiff rests.

I will excuse the jurors. I think I may as well excuse you for the day. Come back tomorrow at a little before ten o'clock. Heed my instructions as I said before.

(The jury left the courtroom.)

MR. STREAM: Judge Levet, I want to make a serious motion at this point but I want to assemble my exhibits first. I would like to go off the record.

THE COURT: All right.

(Discussion off the record.)

THE COURT: All right; 9:45 tomorrow.

(Court adjourned to 9:45 a.m., April 29, 1975.)

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SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

AJAX HARDWARE MANUFACTURING CORP.

vs. 69 Civ. 1900

INDUSTRIAL PLANTS CORP.

April 29, 1975
10:00 a.m.

(Trial resumed.)

(In open court, jury not present.)

THE COURT: I am ready to listen as soon as you are ready.

MR. STREAM: I need three minutes, your Honor. I didn't know the Court was coming out.

THE COURT: Yesterday afternoon, I forgot I had an appointment with the ophthalmologist.

May I say this before you start, Mr. Stream: I think it might be advisable if you handled your motions separately with respect to the various counts.

MR. STREAM: Very well.

MR. GARTNER: If your Honor please, we have served on Mr. Stream our supplemental requests to charge. I would like to hand up a copy to the Court.

THE COURT: I will give it to my clerk.

MR. GARTNER: Thank you, your Honor.

THE COURT: And did he serve you with a copy?

MR. GARTNER: He has, yes.

THE COURT: If he has not, I will ask him to. He has served you then, sir?

MR. GARTNER: Yes.

THE COURT: Thank you. Everybody is in order then.

MR. GARTNER: It is entitled, "Defendant's Requests to Charge," and "Defendant's Additional Requests to Charge," consisting of two pages.

THE COURT: Will you let him number them consecutively, Mr. Stream?

MR. STREAM: Yes. The first set Roman I and the second Roman II.

THE COURT: No, I mean number them consecutively as to the specific individual charges, 1, 2, 3, 4, so on.

MR. STREAM: I have done that.

THE COURT: I didn't know you had.

(Pause)

MR. STREAM: One more minute, your Honor, and I am ready.

(Pause)

MR. STREAM: If the Court please, the plaintiff having rested at this time, the defendant moves for a

judgment under Rule 41(B) of the Federal Rules of Civil Procedure for a judgment dismissing the complaint on the merits on the ground that on the facts and on the law the plaintiff has failed to show a right to relieve on Count 1 which charges a contract breach; that the plaintiff has failed to show a right to relieve on Count 2, which charges negligence and that it failed simply on the facts and on the law to show a right to relieve on Count 3, which charges common law fraud, actual fraud.

The defendant moves alternatively for a directed verdict in its favor upon the same grounds, namely, that the plaintiff has failed to make a case by even so much as a scintilla of the evidence warranting its submission to the jury.

Now, the grounds, your Honor, for these motions made with respect to each of these several counts are as follows:

This case, of course, is based upon a complant. The complaint spells out the issues in this case. They are narrowed, of course, by the pretrial order, but the complaint and the answer which contains denials delimit the issues. And I am going to start, if I may, with the first count, your Honor.

THE COURT: Contract.

MR. STREAM: Which is the contract case and point out that in the complaint, the plaintiff charges that there was a contract. In paragraph 4, the plaintiff says that there was a contract to make an appraisal report.

That is the allegation of the undertaking by the defendants, that in August 1966 the defendant agreed to appraise certain machinery and equipment, namely, the equipment at Time & Micro Industries, Incorporated, and to advise and report to the plaintiff, in the words of the complaint, in the words of paragraph 4(a), to advise and report to the plaintiff the true market value thereof.

Now, also contained in that allegation are references of an evidentiary nature to the objects and purposes of that contractual undertaking, but they in no way, of course, extend or amplify the allegation of the contract itself, and that is the allegation that the defendant was engaged to report to the plaintiff on the true market value of the Time & Micro facilities, and the engagements, said the plaintiff, was by the plaintiff itself.

If the Court will turn to paragraph 11, the Court will see what the defendant then alleges are the breaches.

THE COURT: What the plaintiff alleges.

THE COURT: What the plaintiff alleges, I beg your pardon.

THE COURT: Paragraph 11?

MR. STREAM: Yes All of the intermediate allegations are nothing but the kind of evidentiary data which perhaps doesn't belong in the complaint, but in no way amplifies, as I already stated, the allegations of the contract itself or, for that matter, adds to the allegations of the breach.

Now, what is it the plaintiff says the defendant breached?

The allegation is that in making the appraisal, the defendant breached its contract to make a true and accurate appraisal in that -- and those are the key words, because there then follows the allegations breached -- in that it, the defendant, represented -- I guess what the plaintiff means in a complaint charging breach of contract is that the defendant appraised -- he used the word "represented" -- it may have relevance in a fraud count but not in a count involving breach of contract.

In any case, the plaintiff says that the contract was breached in that the defendant gave a fair market value of $1,056,891. Then we skip the next few words which

are evidentiary -- when in fact, says the plaintiff, the value of the machinery was only $145,000.

In other words, what the plaintiff says is that the defendant was engaged to do a fair market value appraisal and then breached the contract in that the value, says the plaintiff, was no more than $145,000.

Now, that, of course, is a patent nonsequitur. There is simply no logical nexus between an allegation that a defendant was engaged to do a fair market value appraisal and the claim that it was breached in that there was a difference between the fair market value appraisal and what the defendant says the value of the property was.

So we have to turn to the evidence to find out, your Honor, briefly what it is that happened here. And what happened here was that the evidence uniformly, excepting only for the oral testimony of Mr. Klein given in response to a couple of questions put to him on written interrogatories, the testimony uniformly, without a single variation demonstrates and establishes clearly, convincingly and overwhelmingly that the plaintiff rendered an appraisal which was not a liquidating value appraisal --

THE COURT: Defendant, you mean.

MR. STREAM: Defendant, I mean. Again I am in error.

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

The defendant gave an appraisal which was not a liquidating value appraisal, a forced liquidating value appraisal, but a fair market value appraisal in-place, on site.

Not only does Thaler, the defendant's appraiser say that, but the plaintiff's expert, Mr. Sinclair, readily acknowledged that the particular appraisal which was given in this case by Industrial Plant Corporation was not a liquidating value appraisal; it was a fair market value appraisal in-place, on site.

Now, in addition to that, the correspondence both from Mr. Lewis and Mr. Klein confirms the fact that the appraisal which was rendered was a fair market value appraisal in-place and on site.

I refer the Court, in the first place, to the letter of August 23rd, written by Mr. Lewis.

THE COURT: What exhibit is that?

MR. STREAM: To Mr. Thaler, which was marked Plaintiff's Exhibit 10 in evidence.

And that letter, among other things, points out, as Mr. Lewis says to Mr. Thaler, "You speak about the fair market value. We would like to have a definition of it. But as Mr. Klein discussed with you, Mr. Thaler," says Mr. Lewis, "We would also like for our information,"

quoting the letter, "What in your opinion the machinery would bring under a forced sale."

Now, because after all, he says you are also auctioneers.

Now, if ever there was an explicit, implicit letter that the appraisal, the plaintiff was not a forced liquidating appraisal, but a fair market value appraisal on site, in-place, that letter was it. He acknowledges what he got and says he would also like something else.

That's all right. He may want something else, but got what he wanted. He didn't reject this, your Honor. He didn't turn around and say, "I don't want it, I won't pay for it, this isn't what I ordered.

He said, "Thank you very much, give me a fair definition of market value but I would also like for my own benefit your opinion of what it would bring at forced liquidation."

And I add to that, your Honor, that Mr. Klein on October 5th in a letter sent to Industrial Plants and marked in evidence as Plaintiff's Exhibit 13, said the same thing.

He wrote and he said that he understood, referring to Mr. Sidney Kriser's guarantee. The Court will remember that there was marked in evidence as Plaintiff's

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Exhibit -- it was a Defendant's Exhibit K. The Court will remember that Mr. Kriser offered to give a 120 day stand-by guarantee of $350,000 on the machinery and equipment and we will get into that if necessary later on, but at the moment, on the basis of this motion, I simply call the Court's attention to it because in this letter which Mr. Klein wrote to the defendant Industrial Plants on October 5th -- this is Plaintiff's Exhibit 13 -- he said, "We know that the forced liquidation value will be no more than $450,000."

No more than $450,000. Now, your Honor, if the plaintiff knew that the forced liquidation value would be no more than $450,000 and he heard Mr. Kriser give a stand-by guarantee of $350,000, he well knew that the fair market value appraisal that he got in-place was something entirely different from a forced liquidation value.

I am not going to stress the point any further, except to point out that the plaintiff cannot take a fair market value appraisal which they acknowledged and paid for.

I add, your Honor, that the invoice which was rendered to the plaintiff and was received in evidence as Defendant's Exhibit F asked for a $4,420 fee for professional services rendered in connection with a fair market value appraisal.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

And I point out parenthetically, your Honor, that Mr. Sinclair, the plaintiff's expert, made very clear that a fair market value appraisal on site and off site was a horse of a color entirely different from what he called a forced liquidation value appraisal. He made that distinction abundantly clear.

So I submit to this Court that what the plaintiff got, the plaintiff paid for and what the plaintiff got and what the plaintiff paid for, the plaintiff wanted and I submit to this Court that it doesn't necessarily follow -- in fact, it doesn't follow as a matter of logic, as a matter of law and as a matter of fact that because fourteen months later a sale was made at forced liquidation under the auctioneer's hammer that ergo there was a breach of a contract.

THE COURT: I'll ask you this: What do you say was the contract? What kind of an appraisal?

MR. STREAM: The contract, your Honor, was a fair market value appraisal on site in-place, the appraisal described it as in-place, on site.

THE COURT: What do you say was delivered?

MR. STREAM: A fair market value appraisal on site, in-place.

THE COURT: The same as the alleged contract.

MR. STREAM: Precisely. And I will assume for a minute, for the sake of argument, that if the plaintiff did not want what it got, because it certainly got an in-place appraisal, even as I say the experts, the wonderful experts which were produced by the plaintiff, had to concede that this -- if this was anything, it was not a forced liquidation appraisal. He said it squarely, verbatim.

But I am going to assume that what the plaintiff got was a liquidating value appraisal.

In the first place, putting aside that they never rejected this appraisal -- my answer to that, your Honor, is this:

If they got what they did not want, first of all, they should not have paid for it.

In the second place, the breach in that case would have been a breach in that they did not get what they ordered. If the plaintiff wanted a liquidating value appraisal, then the breach was in that the defendant did not deliver what the plaintiff ordered.

The breach is not that the plaintiff got an appraisal showing $1 million and that the contract was breached because the auction returned $100,000. It doesn't follow. There is no nexus between those evaluations.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Since the plaintiff does not allege that the breach consisted in the rendition of an incorrect appraisal, that is to say, the wrong type of appraisal, it can't be raised at this point.

All that the plaintiff says is that the defendant breached its contract in that the appraisal it got, which was certainly not a forced liquidation appraisal, that the contract was breached in that only a hundred odd thousand was realized on the sale, whereas, an appraisal that the defendant rendered showed a value of a million dollars and the reason that is a nonsequitur is it is like mixing apples and oranges; they just are not related to each other.

Your Honor, the second cause of action stands on no different footing. The second cause of action is precisely the same as the first cause of action, except that the plaintiff says that whereas, the defendant under Count 1 agreed to do a good and accurate and so forth appraisal. In Count 2, he says the defendant did not do it and it was negligent in that respect.

I submit to this Court that there is not a scintilla of evidence of negligence and I'll buttress that by pointing out that there is not one word in this record during the course of the entire plaintiff's case, five days of testimony, that impugns the accuracy of one figure in

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

the defendant's appraisal.

We have heard experts talking all about how we should have had cost bases and vendors and we should have had preliminary letters and all that sort of thing but your Honor will certainly recall that when I asked this Mr. Sinclair, the only person to talk about values -- when I said, "Mr. Sinclair, put aside all of these questions about the form" -- what your Honor called professionalism -- "Can you point to one figure in the defendant's appraisal that is wrong," he said, "No, I can't do that. I did not see the machinery. I have no idea what it was worth. All I can say is it was unprofessional."

And your Honor said, "Well, if it was professional, would that be assurance that it was right?"

And I said, "The fact it wasn't done professionally, does that indicate in any way that a single figure was wrong?"

He said, "I can't answer that."

So it becomes difficult to understand how the plaintiff expects to go to the jury claiming that a thing was negligently prepared and the figures are wrong when there is not proof that a single figure should have been higher or lower, not one figure.

Count 3, of course, is a monstrosity, an

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

indignity, it is a charge of fraud. I need state no more than to point out that the elements of common law fraud are among others, of course, a willful intent to deceive and scienter, a willful intent to deceive was never established, could never have been established in this situation, because what the defendant did the plaintiff knew about all the way through, including the use, your Honor, of the Hirschmann appraisal because it was the plaintiff which gave to the defendant the Hirschmann appraisal, so for the plaintiff to splay out and allege fraud is an interesting gesture but it is certainly an improper issue to be submitted to this jury in this case.

For those reasons, your Honor, I move that each and all of the three counts of this complaint be dismissed at this time.

THE COURT: Very well, I'll listen to Mr. Gartner and you may reply briefly after that.

Proceed, Mr. Gartner.. Will you follow the same order if you can, please.

MR. GARTNER: Yes, your Honor.

May it please the Court, the motion which defendant has made is made under the wrong rule and under the wrong pleading. The defendant says --

THE COURT: What is that again? I don't

understand what you mean.

MR. GARTNER: I will explain it in a moment, your Honor, if you will allow me.

THE COURT: I will, of course.

MR. GARTNER: Rule 41-B which defendant cited applies to a trial without a jury and it permits the Court to decide the facts. This is a case before a jury and the decision as to the facts, of course, is, as the Court knows, for a jury.

THE COURT: If there are facts.

MR. GARTNER: If there are facts.

THE COURT: All right. I just state that, counselor. I don't indicate anything by it.

MR. GARTNER: I say, your Honor, that the motion is also made under the wrong pleading because counsel has referred to the complaint but there is a pretrial order in this action --

THE COURT: Well, does that bring in something not in the complaint?

MR. GARTNER: -- which starts by saying, "The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this pretrial order."

THE COURT: What do you say was the amendment

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

brought in by that?

MR. GARTNER: Well, I will simply read paragraph 9, your Honor.

It says, "The issues to be tried are formulated by the Court with the consent and agreement of the parties as follows:

"What were the terms of the oral agreement between plaintiff and defendant made on or about August 12" --

THE COURT: Let me find it.

MR. GARTNER: It is page 10 of the pretrial order.

THE COURT: Yes, I have page 10. What were the terms of the oral agreement? Yes.

MR. GARTNER: Yes -- "between plaintiff and defendant made on or about August 12, 1966.

"2. Did the defendant breach the aforementioned agreement with plaintiff?"

There is no specification of this or that or the other; there is no limitation. There is a general question to be determined at this trial -- did the defendant breach the aforementioned agreement with plaintiff?

"3. Was the defendant --

THE COURT: Wait a minute. Let me interrupt you and you will excuse me for doing so.

We first have to decide, then, 9-1. What were the terms of the oral agreement, is that correct?

MR. GARTNER: That's correct, your Honor.

THE COURT: And then, second -- let me finish, won't you please?

MR. GARTNER: Yes, of course, your Honor.

THE COURT: Second, the defendant breached the aforementioned agreement, correct?

MR. GARTNER: That's right, your Honor, and there is no specification. If there was any breach under any theory, that is to go to the jury; if there is a question of fact, if there was a breach under any theory, not a limited specification.

This is not a criminal indictment where counsel for the defendant says, the complaint says in that thus and so and so on and so on. This is a very general issue to be tried -- was there any breach -- and I will suggest to your Honor what those breaches were.

THE COURT: Of the contract?

MR. GARTNER: Of the contract.

THE COURT: What do you say the contract was first?

MR. GARTNER: We say the contract was, as stated by Mr. Klein in his deposition, that the Ajax Company wanted an appraisal by which it could determine whether the security of this machinery and equipment was sufficient as collateral for a loan of approximately $250,000 and that Mr. Klein in his subsequent letter also said that he had asked specifically for replacement value and for liquidation value and there was never --

THE COURT: Let me ask you about the force of that letter.

Isn't that simply a self-serving declaration, counselor?

MR. GARTNER: No, your Honor.

THE COURT: Why isn't it? Why isn't it?

MR. GARTNER: Because it was not denied by the defendant. It was sent to them and delivered to them.

A self-serving declaration is something which you make at a time when the defendant doesn't have an opportunity to respond to it but Mr. Lewis, on August 23rd, the very day after he got the full appraisal report, wrote a letter to Mr. Thaler in which he says:

"You speak of the value of the equipment and its fair market value. In our usual appraisals, we have always received a definition of what is mean by fair market value.

Therefore we would like to definition from you as to your interpretation of fair market value."

He is not accepting what he got supinely and saying thank you very much. He is saying, very clearly, what are you talking about?

THE COURT: Listen, don't should at me.

MR. GARTNER: Oh, your Honor, I am not shouting at you.

THE COURT: Well, I wish I had a decibel machine here somewhere.

MR. GARTNER: Well, your Honor, if I speak softly, your Honor says you can't hear me.

THE COURT: I can hear you.

MR. GARTNER: I don't know how to handle this, your Honor. When Mr. Stream was shouting in --

THE COURT: Proceed, to the best of your judgment. I did not hear any screaming by Mr. Stream.

MR. GARTNER: He was shouting all the time he was talking and your Honor did not say a word and, moreover, your Honor did not interrupt him.

THE COURT: Well, I reserve the right to interrupt and ask questions in any such motion, counselor. Now, don't deny that right to me.

MR. GARTNER: Of course, your Honor, but why does

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

it always happen to be the plaintiff's counsel.

THE COURT: I asked Mr. Stream some questions. Now, go on, won't you, please?

MR. GARTNER: Sure. It is very difficult, your Honor, for me to make a connected argument when I cannot speak --

THE COURT: Go ahead and do your best. I'll listen to every word you say, counselor.

MR. GARTNER: I cannot speak two sentences in a row.

Now, if I may refer, and please tell me, your Honor, if my sound is right or whether it is too high or too low. I can vary, I am adaptable. I just don't know what your Honor wants me to do.

THE COURT: Well, I will, if it is either, counselor, don't worry.

MR. GARTNER: All right. Thank you very much, your Honor. I have no pleasure in shouting, your Honor.

MR. STREAM: Can't we get to the motion? Is there any way we can get him to stop?

THE COURT: Just be quiet and let him speak, Mr. Stream.

MR. GARTNER: There we are.

Going back to the letter of August 23, 1966, your

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

Honor, Mr. Lewis did not accept just without question what he had gotten. He said very clearly, what are you talking about; what do you mean by fair market value, and he went on to say, "As Mr. Klein discussed with you" -- and I will call your Honor's attention to the fact that there was only one discussion about the terms of the agreement with Mr. Klein and with Mr. Thaler. That occurred on August 12th where the terms were set.

There is no testimony in Mr. Thaler's deposition or elsewhere that after the terms of the appraisal were set on August 12th that there was any subsequent discussion and I'll digress for a moment, your Honor, to say, point out to you, that the reason why the calendar was introduced in evidence last evening is not for any reason related to its similarity to the kitchen sink.

The reason it was put in, your Honor, is that the calendar shows that August 12th was a Friday and Mr. Thaler testified, in his deposition which was read, that he was not in his office on Saturday, August 13th; he was not in his office on Sunday, August 14th; and that he went directly to the heliport on August 15th to go to the Strasburg plant to start the appraisal.

So that there was no conversation, no discussion of any kind between Mr. Klein and Mr. Thaler between the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

time that the terms of the agreement were made on the 12th and the time he did the appraisal.

Therefore, when Mr. Lewis is saying, and I suggest also, your Honor, that -- well, I'll pass that -- when Mr. Lewis is saying, has Mr. Klein discussed with you, he is obviously referring to the one time when they discussed the terms of the appraisal and he said, we would also like for our own information -- you can put the emphasis wherever you want -- of course, Mr. Stream is going to put the emphasis on "for our own information" -- but he said in this letter, in this one discussion, only one discussion, that Mr. Klein said, "We would also like for our own information what in your opinion the equipment would bring under a forced sale."

Now, that was sent to Industrial Plants on August 23rd. How did they respond to it? I'll get back to the last line.

The last line in that paragraph says, "Since I understand, since I understand" -- now, he is not talking about the discussion or the conversation which Mr. Klein had with Mr. Thaler at that point.

He is saying, "Since I understand that you are also auctioneers and liquidators, we would like to know what your organization would be willing to pay for the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-45[illegible]

equipment of Time & Micro to be liquidated at your convenience."

That is a third request but it has nothing to do with the two requests which Mr. Thaler made of Mr. Klein in the one discussion which they had.

Now, what was the response to this letter? It is in evidence, your Honor. On August 30th --

THE COURT: What is the exhibit?

MR. GARTNER: It is Defendant's Exhibit K.

THE COURT: All right.

MR. GARTNER: On August 30th, in response to that additional request for what Industrial Plants would be willing to pay themselves, which had nothing to do with appraisal, Mr. Kriser wrote and said, "We will give you a stand-by guarantee in the amount of $350,000."

But with respect to the other items, the other two items in that letter which related to the appraisal, Mr. Kriser wrote a separate letter on the same day, August 30, 1966, and that is in evidence as Plaintiff's Exhibit 18.

Well, these were in order which I gave them to you, Mr. Stream.

MR. STREAM: Well, sir, that is indeed a tragedy.

MR. GARTNER: It is. Okay.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

18. This is a separate letter, written on the same day as Defendant's Exhibit K. Plaintiff's Exhibit 18:

"Dear Mr. Klein: In connection with appraisal our Mr. Jesse Thaler made at Time & Micro Instruments Corp. in Strasburg, Pennsylvania, I suggest that you have your bank communicate with Mr. Charles Mansfield, Park Avenue branch of Marine Midland Grace Trust Company, or Mr. Jack Lawrence, 41st Street branch of the Chase Manhattan Bank, to verify the authenticity and reliability of our appraisal figures.

"Both of these men, who are vice presidents of their institutions, are well qualified to assure your bank that the appraisal figures that we have indicated in connection with Time & Micro is a solid and scientific evaluation of the assets in question."

Now, that was their response. They did not answer Mr. Lewis directly and tell him what he wanted to know, whether -- what did fair market value mean. They did not tell him what the liquidation value was, although he said in his letter of August 23rd that Mr. Klein had also asked for the forced sale value.

What they said to him is, you can rely on our appraisal and what did the appraisal say? The appraisal said two things: The fair market value is in excess of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTH

$900,000 and, number two, it is inconceivable that regardless of what happens to the used machinery market in the next two years, that this equipment and machinery will be worth less than 60 percent of that; that is $540,000, your Honor.

Now, of course, Mr. Sinclair said that that appraisal did not contain a liquidation value because he is a professional appraiser and when he gives an appraisal that says liquidation value, it says liquidation value. But what this appraisal did was to give something which they called inconceivable, inconceivable that it could be any lower than that.

Well, that includes every value. It is not a specific liquidation value. It is a value than which there is no lower value, your Honor.

Now, let's get back to the question of breach of contract. There are many possibilities, your Honor; there are many options. I don't know what counsel is going to argue in his summation.

THE COURT: And he probably doesn't know what you are going to argue, so it is even.

MR. GARTNER: Then if your Honor please, I would like to try to keep things that way and not disclose in this argument on an unmeritorious motion what the summation

is going to be.

THE COURT: That is up to you, counselor.

MR. GARTNER: But I will say this much, your Honor, that there are at least two theories on which we have shown on the evidence here a breach of contract.

THE COURT: What are they?

MR. GARTNER: Number one is that we have shown in direct, clear testimony, that the terms of the contract called for replacement value and liquidation value and we did not get it. We got all kinds of assurances which, in effect, said to us, you don't have to know that specific thing. You can rely on our appraisal. But we did not get what we had asked for.

Now, on the second theory, even if we assume what Mr. Stream's theory of the contract and the terms of the contract are, that Mr. Thaler's testimony is to be credited and, of course, there is a sharp issue of credibility there between Thaler and Klein -- this is apparent from the opening statements -- that this is what the jury is going to have to decide.

THE COURT: What the contract was.

MR. GARTNER: What the contract means because -- what the contract was, because Mr. Klein says it was one thing and Mr. Thaler says it was another.

THE COURT: That is the chief issue, isn't it, counselor?

MR. GARTNER: That is, that is a fundamental issue, yes, your Honor. And, of course, that is something which is or on which there is a sharp issue of fact and, as I understand the rules, there is no way in which this Court can decide that issue.

THE COURT: All right. I have your point on that, sir.

MR. GARTNER: Now, but even assuming that the jury should find that Mr. Thaler's concept of the contract was the correct one and that what had been asked for was the fair market value of the plant in-place, we did not get a professional appraisal of that, your Honor.

THE COURT: In what respects, counselor? Just briefly.

MR. GARTNER: In the respect that there was no proper inquiry made as to what this plant was worth, whether there was any buyer for it. Mr. Stream says that there is not a scintilla of evidence that any figure in this appraisal was less than completely accurate.

Mr. Sinclair testified in very clear terms that none of those values were accurate, that nobody would have paid that kind of money for that kind of equipment at that

time and he said unequivocally that in 1966 you could not find anybody in the entire United States who would buy a plant of this kind intact, in-place, for any price, let alone the price which was on that appraisal.

Now, we say, your Honor, that it is an implicit term in a contract for a professional appraiser, that the appraisal be done in a professional manner. It is exactly as though a lawyer were to be retained to do a job in connection with a legal matter. He is expected as a part of a contract to perform in a professional manner and it is both a breach of contract and negligence if he does not perform in a professional manner because it is part of the contract that he must perform in a professional manner.

Mr. Thaler testified unequivocally in his deposition that he understood that he was being hired to give his best professional -- his best professional judgment, your Honor.

THE COURT: As to what?

MR. GARTNER: As to the appraisal.

Now, whether it is a fair market value in-place appraisal or a forced liquidation value, it doesn't matter because he did not do a professional job and that is a breach of contract, your Honor.

Now, getting to the second cause of action on

negligence, as I have already said, many of the deficiencies and defects and defaults which constitute lack of professional performance of the contract and therefore breach of the contract also constitute negligence but, in addition to that, there was specific testimony that Mr. Thaler did not turn on the machines, that he made no inquiry as to the marketability of any of these machines, that he did not disclose that he was basing his so-called values upon information which he admittedly got from some other piece of paper, some other appraisal, if you will --

THE COURT: Well, there is a certain position on that taken by Thaler in the deposition to the effect that he was doing as he was instructed there, counselor.

MR. GARTNER: Well, that is his position and that is another question for the jury.

THE COURT: It is a question of act, of course.

MR. GARTNER: Yes, for the jury and that is his position.

THE COURT: But it is the defendant's contention, anyway.

MR. GARTNER: But even, even if the jury should believe that contention, your Honor, you come up against the insurmountable obstacle that the professional

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

appraiser in those circumstances is obligated to disclose --

THE COURT: Just let me interrupt you there, sir. You say that irrespective of instruction, he must do so and so and so and so?

MR. GARTNER: He must disclose to the purchaser, to the client, if you will, he must disclose that he based his report on those instructions.

THE COURT: According to Thaler's deposition, wasn't he instructed to do so and so?

MR. GARTNER: It doesn't matter whether he was instructed, your Honor. If he doesn't tell the client that he followed those instructions and that he relied --

THE COURT: You mean afterwards?

MR. GARTNER: Afterwards, of course, your Honor.

THE COURT: Let me ask you a plain question and forgive me for interrupting you, counselor.

MR. GARTNER: No. I welcome this interruption.

THE COURT: Why does he have to do that when he's already been instructed by the client?

MR. GARTNER: Because at the time when the customer gets his appraisal without a statement in there that in accordance with your instructions, I have relied upon the Hirschmann appraisal, the client has no way of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

knowing that that is the basis for the appraisal. The client --

THE COURT: After the client has already instructed him?

MR. GARTNER: Of course, your Honor, because --

THE COURT: All right.

MR. GARTNER: The client has told him to render a professional judgment on it.

THE COURT: All right.

MR. GARTNER: Your Honor, it is just as though a client comes into a law office and says, I want your best legal opinion on what this case means and what I can do in these circumstances, but he says, you are authorized to consult with another lawyer and to rely on what he tells you.

THE COURT: Suppose he brings in the opinion of the other lawyer?

MR. GARTNER: And suppose he brings in the opinion of the other lawyer.

THE COURT: And tells him he may place some reliance on that?

MR. GARTNER: You may place some reliance on that and then, after so many days, the lawyer who has been asked to give his opinion, writes an opinion letter saying that

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

JW:mg 10 S. Kriser-direct

DIRECT EXAMINATION

BY MR. STREAM:

Q Mr. Kriser, what is your connection with Industrial Plants Corporation?

A I am the president of the corporation.

Q How long have you held that office?

A Approximately four years.

Q How long have you been associated with Indsutrial Plants Corporation?

A Approximately 40 years.

Q Before becoming the president of the company, did you hold any official office?

A Yes, I was the vice president, secretary and treasurer.

Q And in the years 1964 to 1968, what office did you hold?

A Secretary-treasurer and vice president.

Q And vice president?

A Yes.

Q Who was the president during those years?

A David Kriser.

Q Is he related to you?

A My brother.

Q All right. Is he still connected with the company?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

A Yes. Well, primarily that was his function.

MR. STREAM: Excuse me, sir.

May I approach the bench? It is not important.

THE COURT: All right. Off the record.

(Discussion off the record)

MR. STREAM: What was the last question and answer, please?

(Record read)

THE COURT: Was he an officer in 1966 and,if so, what?

THE WITNESS: He was an officer. He was the vice president of the corporation.

THE COURT: All right.

MR. STREAM: All right, I will proceed around this matter that I wanted to talk about until the exhibits are brought in.

THE COURT: Yes. I explained to the jury that my clerk had these exhibits in order to make copies for the Court for the charge.

Q Now, Mr. Kriser, would you be good enough to tell this jury and his Honor when was your first dealing with Ajax Hardware, the plaintiff in this action?

A My first contact with Ajax was in August, 1966, when I received a telephone call in which --

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

Q First tell us from whom the call came.

A From Mr. --

Q -- and how the person described himself to you?

A Mr. Klein --

MR. GARTNER: Objection, your Honor. There is no foundation.

THE COURT: No foundaton? Oh, you mean he has to recognize the voice?

MR. GARTNER: Precisely, your Honor.

THE COURT: Did you talk to someone?

THE WITNESS: Yes, I did.

THE COURT: Did you later talk to the same person?

THE WITNESS: Yes.

THE COURT: And did you recognize it later as to who it was?

THE WITNESS: Mr. Klein.

THE COURT: All right. That is enough.

Q Now, sir, will you tell us, please, what Mr. Klein said -- first of all, tell us approximately the date.

A Well, I know from the letters and so forth that I read the date was August 30th or it might have been the 28th, 29th that I got this telephone call because I responded to it in a letter --

have to tell what you did, if anything.

A All right.

Actually on the 30th of August, I sent a letter to Mr. Klein, pursuant to his request, and I gauranteed him -

Q No. The letter wibl speak for itself, if you can identify it.

A Yes.

THE COURT: Show it to him.

Q By the way, have you ever testified in a proceeding before?

A No, sir, I have not.

Q Let me ask you to look at Defendant's Exhibit K in evidence and tell his Honor and the jury whether that is or is not the letter which you sent?

A Yes, this is the letter.

Q And in that letter, you made the following statement - I am reading this for the refreshment of the jury-- "We are prepared to give you, Ajax Hardware Manufacturing Corporation, a standby guarantee in the amount of $350,000 for a period of 120 days at a fee of 5% on the machinery and equipment located in the plant."

All right now --

MR. GARTNER: Would you please complete that

statement in the letter?

Q Did you, Mr. Klein --

MR. STREAM: I beg your pardon.

Why must I be interrupted in the examination like this?

MR. GARTNER: If your Honor please, the sentence which he read was incomplete.

THE COURT: Read the sentence just to cover this.

MR. STREAM: "located in the plant." These are the last words in this sentence. There is a period there.

Now may I continue? Thank you.

THE COURT: There is a period.

MR. STREAM: I must have overlooked that but I am sorry.

THE COURT: All right.

Q What if anything did you hear from Mr. Klein after sending that letter?

A I didn't hear a thing from him.

Q Well, did you hear from Mr. Norman Louis?

A No, sir.

Q Do you know a Norman Louis?

A No, sir.

Q Have you ever spoken with him?

A No.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

Q Now, was that discussed during your first conversation with Mr. Kleon or discussed with him t a later date?

MR. GARTNER: Objection, your Honor; leading.

MR. STREAM: I don't think so.

THE COURT: Overruled.

A Well, this letter which I referred to is a letter--

Q No. I want you to tell us, please, whether you had a discussion-- you said you had a discussion with Mr. Klein concerning that?

A Yes.

Q Did that discussion take place during your first telephone conversation with Mr. Klein or a later one?

A It had to --

MR. GARTNER: Objection, your Honor. There is no testifimony that there was a first and a later conversation.

THE COURT: I'll sustain it at this point.

Q Did you have a conversation with Mr. Klein concerning it?

A I did.

Q Now, you told us before that you spoke about a guarantee with Mr. Klein on the telephone, right?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

A Yes.

Q When did you discuss the contents of that letter, that is to say, Plaintiff's Exhibit 18 in evidence, with Mr. Klein?

A I discussed this letter and authenticating our guarantee at the same time.

Q Tell us what Mr. Klein said to you and what you said to him in that connection?

A I repeat that he wanted to know if we would buy --

THE COURT: He said.

A He said he wanted us to either buy or guarantee this plant at Time & Micro.

I told him that I would give it some thought and I would write him, which I did.

I also, at that time, decided to make the guarantee available tohim, which I did.

I also sent him a letter giving him our bank references to authenticate the validity of the guarantee.

Q Had he or had he not requested that?

A He had-- yes, because he needed that to authenticate our guarantee.

THE COURT: What did he say about it?

THE WITNESS: I have no recall, your Honor.

Q Just tell his Honor and the jury whether you recall his asking for that?

A Yes, he asked to substantiate the fact that we were able to buy and pay for it or make a guarantee and pay for it.

Q And my next question, sir, is did you provide him with any additional information than that which is set forth in this letter of August 30, marked Plaintiff's Exhibit 18?

A No, sir.

Q Did you ever get a letter from Mr. Klein or anybody else at Ajax accepting that offer?

A No, sir.

Q Let me show you a letter which has been marked as Defendant's Exhibit N for identification and ask you whether or not you ever saw this document before.

THE COURT: Before now?

MR. STREAM: Yes,before today.

A Yes, sir, I did see this.

Q Now, noting its date, can you tell us whether or not you saw it for the first time on or about that date?

A Yes.

Q And can you tell his Honor and the jury, noting the addressee of that letter, whether you can recall from

jb:mg 32 S. Kriser-direct

A Approximately a year after I had offered this guarantee to Mr. Klein.

Q That would have been around August of 1967, right?

A Yes.

Q And did Mr. Weissman -- is that W-e-i-s-s-m-a-n?

THE COURT: Get to the identification.

Q Did he tell you who he was?

A Yes.

Q Whom did he say he was?

A He said he was the attorney and he was also an officer of the Time & Micro Corporation and he represented Ajax on the Coast.

MR. GARTNER: I object to that.

Q What did he say?

MR. GARTNER: I object to that, your Honor.

THE COURT: Sustained.

MR. STREAM: What did your Honor say?

THE COURT: Sustained. I have to sustain it. It is merely a representation of an attorney or agent.

Q Did Mr. Weissman-- just answer this question, if you know, yes or no, so we can see whether there is a foundation properly laid-- did he or did he not tell you that he had been requested to report to his people at Ajax

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

on some matters that he wanted to discuss with you?

MR. GARTNER: Objection. Your Honor, it is hearsay.

THE COURT: This may be some evidence but I think it is inadequate.

I have to sustain the objection.

Q Did you ever have another conversation with Mr. Klein after the first one you have related?

A No, sir.

Q Did you ever have any conversations with anybody at the Ajax Company other than Mr. Klein, and putting aside Mr. Weissman?

A No.

Q And did there come a time when an auction was conducted by your company of the machinery and equipment at Time & Micro?

A Yes.

MR. STREAM: You may cross-examine.

CROSS-EXAMINATION

BY MR. GARTNER:

Q Mr.Kriser, when did the Industrial Plants Company conduct the auction to which you have just referred?

A In October 1968.

MR. COURT: Do you know the date?

Q 1968?

A Or 1967-- I have the-- October 10, 1967.

Q Who retained you to conduct that auction?

A Well, it was a combination of David Weissman and a law firm in Phil delphia--

THE COURT: Was that by writing?

THE WITNESS: Yes, sir. -- known as Wolf, Block, Solis-Cohen.

Q Didn't you have an agreement with the Time & Micro Company and the First Western Bank of California?

THE COURT: What?

MR. GARTNER: To do the auction?

A I think our contract would indicate that.

MR. STREAM: I offer to counsel the document which I overlooked asking the witness to identify.

Q I just want to know whether under this contract you were hired by Time & Micro Instruments and the First--

THE COURT: Do you want to refresh his recollection?

Q -- and the First Western Bank?

MR.GARTNER: Yes.

A Yes, the First Western Bank & Trust Company.

THE COURT: Now let's have the record clear. Will you state on the record who authorized or

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Q Do you know the difference between an appraisal and guarantee?

A I certainly do.

Q What is the difference between an appraisal and a guarantee?

A An appraisal is a statement of values having to do with reproductive value, fair market value, sound value, liquidating value; and a guarantee of any of those values is a positive placement of dollars onto a set of assets that someone would be willing to pay or guarantee the return that those assets would bring.

Q Is it accurate to say it's a commitment to pay a certain number of dollars for a particular asset?

A That is what it is, yes.

Q All right.

THE COURT: What is the answer?

THE WITNESS: Yes, sir, it is.

THE COURT: Who does the guarantying?

THE WITNESS: In this instance I did, sir.

Q Well, you didn't actually make any guarantee in this instance, did you?

A Oh, yes, I did, sir.

Q You made a guarantee?

A Yes.

Q You signed a guarantee?

A No, I offered a guarantee.

Q Oh, you offered one?

A Yes.

Q But you didn't make one?

A No, I offered one.

THE COURT: However, it was never delivered?

THE WITNESS: No, sir.

THE COURT: Or asked for?

THE WITNESS: No, the prinicpal never asked for a commitment letter.

Q You offered a guarantee by Defendant's Exhibit K, didn't you?

THE COURT: Let him see it.

MR. GARTNER: He has it.

A Yes.

Q On what terms did you offer the guarantee?

A I offered a $350,000 guarantee for the machinery of Time & Micro for a period of 120 days.

Q Are those the complete terms?

A For a fee of 5 percent.

Q Oh, a fee of 5 percent. 5 percent of what?

A 5 percent of $350,000.

Q Which is what, Mr. Kriser?

A About $17,500.

Q I see.

And you offered that guarantee for a fee of $17,500 eleven days after your company had submitted your bill for the appraisal which your company had made?

A One had nothing to do with the other, sir.

Q Well, what was the amount of your bill for the appraisal, do you recall?

A Some $4,000.

Q $4,400, wasn't it?

A That's right.

Q And eleven days afterward -- and how much was the equipment appraised at in that appraisal, do you recall?

A Approximately $900,000.

Q And eleven days afterwards you offered to guarantee to buy that equipment for $350,000 for an additional fee of $17,500?

A I offered a stand-by guarantee of $350,000, yes, sir.

Q For 120 days?

A Right.

Q That is four months?

A Right.

Q And you didn't get any takers for that offer, did you?

A No one responded.

Q Now, Mr. Kriser, I show you Plaintiff's Exhibit 18.

A Yes.

Q In that letter you were suggesting to Mr. Klein, were you not, that he get in touch with certain bank offic that you named so that he could verify the accuracy of your appraisal?

A No. The accuracy or the authenticity of my guarantee.

Q Is that what that letter says?

A Well, it meant -- that is exactly what it meant, because it followed --

Q Mr. Kriser, I am not asking you what it meant; I am asking you what it says.

MR. STREAM: Your Honor --

THE COURT: It speaks for itself, Counsel.

MR. STREAM: It does, indeed.

MR. GARTNER: Let me read it, if your Honor please.

THE COURT: I suppose it's been read before, but take a second shot at it.

MR. GARTNER: "Dear Mr. Klein:

"In connection with the appraisal our Mr. Jesse Thaler made at the Time & Micro Instrument Corporation at Strasburg, Pennsylvania, I suggest you have your bank communicate with Mr. Charles Mansfield, Park Avenue Branch of Marine Midland Grace Company, or Mr. Jack Lawrence, 41st Street Branch of the Chase Manhattan Bank to verify the authenticity and reliability of our appraisal figures."

Q You used the word "appraisal" twice in that one sentence and you meant guarantee?

A The guarantee that I gave him, Klein --

Q Mr. -- please answer my question.

A The answer to this letter is yes.

THE COURT: Wait a minute. You will have to answer the question.

Once more, Mr. Reporter. will you read the question?

(Record read)

Q Just yes or no.

A Yes.

Q Now, this letter, Mr. Kriser, Plaintiff's Exhibit 18, was written on the very same day, was it not, as Defendant's Exhibit K?

A It was.

Q And Defendant's Exhibit K --

THE COURT: Is that J or K now?

MR. GARTNER: K, your Honor.

THE COURT: Would you repeat your question?

Q Were Plaintiff's Exhibit 18 and Defendant's Exhibit K written on the very same day, August 30, 1966?

A Right.

Q And both addressed to Mr. Klein?

A Yes, sir.

Q And Defendant's Exhibit K speaks of a stand-by guarantee?

A Yes, sir.

Q And Plaintiff's Exhibit 18 talks about appraisal twice in the first paragraph, and in the second paragraph it says, "Both these men who are senior vice-presidents of their institutions are well qualified to assure your bank that the appraisal figures (that we have indicated in connection with Time & Micro), or any other appraisal that we will sign our name to is a solid and scientific evaluation of the assets in question."

It uses the word "appraisal" twice again in the second paragraph?

THE COURT: It speaks for itself.

A That's right.

Q You say in all of those places you were referring to the guarantee?

A No, I was referring to the guarnatee in the letter.

THE COURT: Which one?

THE WITNESS: The first letter.

THE COURT: Which exhibit?

THE WITNESS: This is K. This is the first letter.

Q Let me see if I understand you, Mr. Kriser. You are saying that in the first letter, Defendant's Exhibit K, you were referring to your offer of a guarantee.

A Correct.

Q What were you referring to in your second letter of the same day?

A This refers to an appraisal.

Q That refers to an appraisal.

And the appraisal that it refers to, Mr. Kriser, is Plaintiff's Exhibit 5-A, isn't it?

A Not necessarily.

Q Not necessarily?

A No, because it says that "this appraisal or any other appraisal that we will sign our name to is a solid

13 jwmch 51 S. Kriser-cross

THE COURT: Is that right, Mr. Witness?

Do you want the question read?

THE WITNESS: No, sir, I remember the question.

Q You referred, Mr. Kriser, to several different kinds of values, in-place value, liquidation value, and so on.

What kind of a value was that $350,000?

THE COURT: In which exhibit?

MR. GARTNER: In Defendant's Exhibit K.

A This had to do --

Q No. Please tell us --

MR. STREAM: Let him answer it.

A I am going to tell you.

Q What kind of value was it?

A No, I am going to tell you exactly what value it had.

Q Please.

A The Time & Micro appraisal which represented an in-place value of a going plant that Mr. Thaler did of some $900,000 was an appraisal of a going plant.

Q Mr. Kriser, I am not asking you about that. I am asking you about the $350,000 --

A I am going to give you the answer very easily.

MR. GARTNER: I move that the preceding answer

14 jwmch 52 S. Kriser-cross

be stricken as not responsive, your Honor.

MR. STREAM: It is responsive.

THE COURT: I think it is responsive.

Denied.

MR. GARTNER: Your Honor, can I have the question reread?

MR. STREAM: No, I think the question is being answered and I object to counsel interrupting him.

THE COURT: Let him read it and have the answer read.

MR. STREAM: Let him finish it.

MR. GARTNER: There is still no answer.

MR. STREAM: I respectfully suggest there was a part of the answer and the witness is not through.

THE COURT: Have you finished your answer?

THE WITNESS: No, sir.

THE COURT: Finish your answer to the question.

A I had a 900-plus appraisal in front of me of a going plant that I knew the value of, and I was prepared to pay for that $900,000 $350,000 or give it to Mr. Klein as a stand-by for whatever reason he needed -- for back-up purposes, bank loans, whatever.

Q You were prepared to pay --

A To spend my money.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Q -- to pay $350,000 for something you knew was worth $900,000 and you were going to charge in the process $17,500 for that?

A That is not exactly what I said.

Q That is not exactly what you said?

A No, I said I was ready to pay, buy this equipment for that amount, or if Mr. Klein wanted to encumber my balance sheet to the tune of $350,000 I would certainly have to make a charge because that $350,000 at that point became a liability in my company.

Q And that charge was $17,500, wasn't it?

A That's right, that is standard practially in all instances.

Q I am not asking you whether it's standard.

MR. GARTNER: I move that the answer be stricken, your Honor.

THE COURT: Strike out "standard practice."

Q Mr. Kriser, please --

THE COURT: I instructed it be stricken out.

Q Will you please, Mr. Kriser --

A Yes, sir.

THE COURT: Go ahead with the next question, please.

Q Thank you, Mr. Kriser.

THE COURT: Let me ask a question. You may object if you like.

Was it a standard practice when any such guarantee was made to have a fee for it?

THE WITNESS: Yes, sir.

MR. GARTNER: Objection, your Honor.

THE COURT: All right. Sustained. I will withdraw the question.

MR. GARTNER: Thank you, your Honor. I think it was prejudicial for your Honor to have asked the question.

THE COURT: Go on with your questions. Let's get through with this witness.

MR. GARTNER: Thank you, your Honor.

Q In your letter of August 30th, Defendant's K, I call your attention, Mr. Kriser, to your statement that Mr. Thaler had made an appraisal covering the machinery and equipment as well as the real estate of Time & Micro.

Was that a true statement?

A I don't recall.

Q You don't recall?

A No.

Q I show you Plaintiff's Exhibit 5.

If there any appraisal of real estate in that?

A No, there is not in this appraisal book.

Q Did your offer of a guarantee relate to the real estate as well as to the machinery, or just to the machinery?

A May I read it?

Q I think you have it in front of you.

A It says that "we are prepared to give you a stand-by guarantee in the amount of $350,000 for a period of 120 days at a fee of 5 percent on the machinery and equipment located in this plant."

Q Does that include the real estate?

A It does not.

Q So that your offer was only with respect to the machinery?

A That is exactly what I stated, yes, sir.

Q And equipment?

A Yes, sir.

Q Did it take into account the in-place value of that machinery?

A Absolutely. It took into account the fact that the plant was an entity and operating plant. That is what I based my guarantee on.

Q Did you know whether this plant was operating or not?

A Oh, yes.

lw jwmch 56 S. Kriser-cross

Q You knew that it was operating?

A Well, it was partially operating. It was operative; let me say that.

Q You mean it could be operating?

A There were several people working in it.

Q Several people; like two?

A Maybe.

Q And you say that your figure of $350,000 took into account that it was a plant in place capable of being operated?

A That is correct, yes.

Q Did you know who owned the real estate?

A No.

Q Mr. Kriser, if we assume that the real estate was not owned by the same person who owned the machinery, how could you have an in-place value for that machinery?

MR. STREAM: Objected to. It's an assumed state of facts. It's improper.

THE COURT: Sustained.

Q At any rate, Mr. Kriser, you did not know who owned the real estate?

THE COURT: He said it before.

MR. STREAM: Objected to as answered.

THE COURT: Sustained. It's repetitive.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Q And what are the figures which appear in the column headed "Total"? Is that the sale price?

A The price at which this machine was sold at auction, right.

Q Each particular machine?

A Right.

Q Could you tell us by looking at that what the sale price for Lot No. 609 was?

MR. STREAM: No, your Honor. These documents speak for themselves. In addition to which, your Honor, this isn't proper cross. No one is fighting over the auction sale. And, therefore, this kind of interrogation is irrelevant and immaterial. It wastes a lot of time as well.

THE COURT: I think the paper speaks for itself.

MR. GARTNER: I will withdraw the question, your Honor.

THE COURT: Question withdrawn.

Q Let me ask you, Mr. Kriser, if I may just lean over here, if you will look at Inventory No. 5500 on your appraisal, Plaintiff's 5-A, which is desribed is described as a micron horizontal single-spindle profile miller, and I will ask you whether that is the same machine as appears on the auction sheets as Item No. or Lot No. 609.

A I can assume that it is.

THE COURT: Can you answer that?

THE WITNESS: Yes.

A I think it is the same.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Q Am I correct in saying that that machine, Lot 609, was sold for $100 at the sale?

A Yes.

Q And inventory No. 5500, the same machine was given on the appraisal, a fair market value of $3000?

A It was given an in-place value of $3000.

Q Please, Mr. Kriser--

MR. STREAM: He answered the question. No pleases.

Q What is the heading of that column on Plaintiff's Exhibit 5A?

A The context of the appraisal.

Q What is the heading, please?

A "Fair Market Value."

Q Thank you, Mr. Kriser.

Now, I would like to ask you whether -

MR. STREAM: Your Honor, I will object to Counsel's attempt to take item-by-item and match them up. They are in evidence. There is no issue over the fact that the stuff that was appraised was sold at auction and we can keep at this ad nauseam.

MR. GARTNER: I don't intend to keep at it ad nauseam.

jb:mg 2 S. Kriser-cross

THE COURT: Before you go on, I want to ask this question:

Were all of the items that were sold at the time of the sale in-place?

THE WITNESS: Practically all. There was some in a warehouse, yes.

THE COURT: How many were in the warehouse, if you recall?

THE WITNESS: There were about five or six items in a warehouse.

THE COURT: All right. Go on.

Q Now, just one more item here for a moment.

Lot. No. 168 described as Type I billeter automatic one-spindle profiler, pedestal type, AC motor, new, 1958.

Is that the same as inventory No. 5701?

You pointed it out to me?

A Yes.

Q Thank you. And the fair market value listed in the appraisal is $7000?

A Right, sir.

Q What did it sell for at the auction?

A You can read it there. I can save my voice.

$50. No, I beg your pardon; $125.

Counselor.

MR. GARTNER: These appraisals were sent out on the responsibility--

THE COURT: There is no proof that he sent them out.

Q Mr. Thaler was authorized to send out this appraisal in the name of the Industrial Plants Corporation, was he not?

A Yes, he was, sir.

Q Do you recall, Mr. Kriser, giving a deposition in this case on June 4, 1969?

A Yes.

THE COURT: Is there one in the file, do you know?

MR. GARTNER: I don't know but I'll hand up a copy, if your Honor please.

THE COURT: Thank you.

Q Do you recall being asked with respect to the guarantee offer -- at page 63, line 15:

"Q What was this valuation of $350,000? Was that in place, going concern valuation?"-- and do you recall answering "That was a value that I put on this plant without the real estate as an entity, yes, an in-place value."

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Was that your answer at that time?

A It was.

Q And were you asked at line 19, page 63:

"Q That was the value that you put on the plant?"

And did you answer:

"A Right."

A Yes.

Q Now, is your testimony that the $350,000 value in Defendant's Exhibit K was an in-place value?

A The $350,000 is a value that I was prepared to pay and buy and give this man a standby guarantee for in-place, yes, because that's the only way I could judge its value and the only way that it was appraised.

Q Without the real estate?

A Without the real estate.

MR. GARTNER: I have no further questions.

MR. STREAM: I am afraid I have about five minutes of redirect.

THE COURT: All right, go ahead.

REDIRECT EXAMINATION

BY MR. STREAM:

Q First of all, Mr. Kriser, would you be good enough to tell me whether you reognize any of the signatures on this document, which is a document dated August 25th --

jb:mg 67 S. Kriser-redirect

THE COURT: And have it marked for identification.

MR. STREAM: Withdrawn.

xx (Defendant's Exhibit R marked for identification)

Q Do you recognize any of the signatures on Defendant's Exhibit R for identification?

A No, I don't.

MR. STREAM: Mr. Gartner, do you have a counterpart of this Defendant's Exhibit R for identification?

MR. GARTNER: No, I don't. I think it is irrelevant.

Q One more question.

Mr. Kriser, in the course of your business at Industrial Plants Corporation, do you or do you not from time to time offer guarantees or purchase agreements to customers?

A Yes, sir.

MR. GARTNER: Objection, your Honor, irrelevant to this case.

THE COURT: Overruled.

Q And in that connection, sir, when you offer a guarantee and acquire property as a result of it, for what

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jbesb 74

THE COURT: What do you want to show?

MR. GARTNER: I want to show --

THE COURT: Let me finish my question, if you don't mind. I would like a little courtesy of that character.

MR. GARTNER: I don't mind at all.

THE COURT: What do you mean? What do you draw from that? What conclusion do you draw or could the jury draw?

MR. GARTNER: The conclusion that the jury could draw is that this was not an appraisal that Mr. Kaefer made; it was not a professional appraisal and it is not what Mr. Kriser described it as.

The defendant's case in large part up to --

THE COURT: Don't tell me about the whole wide scope of the defendant's case.

MR. GARTNER: I won't but from the beginning, the opening statement, they said that their defense was that they relied upon the Hirschmann appraisal.

THE COURT: Pursuant to whatever instructions they received, of course.

MR. GARTNER: Right, but they also said, and I quote from the opening statement, that the Hirschmann Company was a very well-known reliable appraisal company.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jbesb 75

I've got to show that the Hirschmann Company was not an appraisal company.

THE COURT: Do you want to make any stipulation that will cure this long and lengthy reading, counsel?

MR. STREAM: No, your Honor.

MR. GARTNER: It can't be stipulated.

MR. STREAM: No way that he will stipulate to it. He will not stipulate.

MR. GARTNER: I've stipulated to many things --

THE COURT: I did not ask you, but to Mr. Stream.

MR. STREAM: I would be happy to stipulate to several pages. I don't think I need to read more than ten out of a 138-page transcript that will put this jury to sleep again.

THE COURT: Can't you stipulate to something as to what the witness said?

MR. GARTNER: Your Honor, if you give me the time in the recess, I'll try to cut it down as much as possible.

THE COURT: When we come back at quarter to two, we will see if you can do the cutting.

All right, get to your agreement, then.

MR. STREAM: I would like the chance, I think if we can move expeditiously, counsel can sum up today and

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jbesb 76

the Court can charge in the morning.

THE COURT: Before we start that, how long are you going to want.

MR. STREAM: About an hour and fifteen minutes.

THE COURT: How long will you want?

MR. GARTNER: Two and a half hours, your Honor.

THE COURT: What you want and what you get may not be the same. I'll take it up with you later. See if you can't condense it at least.

MR. GARTNER: Thank you, your Honor.

(Luncheon recess.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jwesb 79

THE COURT: He may read a stipulation as to what they will be, however. I don't want to interfere wich any efforts to --

MR. GARTNER: I have no objection. Mr. Stream can read whatever he wants.

MR. STREAM: There we go. No stipulation.

THE COURT: I don't see --

MR. GARTNER: I offered a stipulation. He won't stipulate.

MR. STREAM: Good Lord. Your Honor, I am prepared to let him read that provided he also reads mine.

MR. GARTNER: I am not going to read yours.

THE COURT: You can't expect him to read yours.

MR. STREAM: He will have to try his case his own way. I am not ready to stipulate to this.

THE COURT: All right.

(In open court, jury present.)

THE COURT: Now, members of the jury, I will tell you where we are.

The plaintiff has rested, the defendant has rested, and now the plaintiff wants to come back and put in so-called rebuttal evidence of one kind or another and particularly in reference to certain things from the deposition.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jwesb 81 "Kaefer

MR. GARTNER: Mr. Stream's office, by Mr. Stream, yes.

On page 4, line 11 --

THE COURT: I am going to ask you to please omit everything you can.

MR. GARTNER: I will, your Honor.

THE COURT: Page 4, what line?

MR. GARTNER: Line 11:

"Q What is the business of Hirshmann Corporation, Mr. Kaefer?"

THE COURT: Is there some groundwork to show knowledge about this?

MR. GARTNER: Mr. Kaefer was the vice president.

MR. STREAM: I don't want my statements to be made off the record. If he wants to read what the witness said, that is one thing, but no testimony from Mr. Gartner.

THE COURT: All right.

MR. GARTNER: Yes, there is groundwork, your Honor. Mr. Kaefer identifies himself in the deposition

THE COURT: All right. Go ahead.

MR. GARTNER: Thank you, your Honor.

"Q What is the business of Hirschmann Corporation, Mr. Kaefer?

"A Hirschmann Corporation is a distributor of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jwesb 82 "Kaefer

machine tools that originate largely in Europe; distributor, also an engineer, an engineering company that advises its clients as to methods, as to manufacturing ideas" --

MR. STREAM: Can we read a little slower, your Honor, the jury has to absorb this.

THE COURT: Yes, the jury has to get this. I don't blame them.

MR. GARTNER: I am trying to save time, your Honor.

THE COURT: No, you won't save time this way.

MR. GARTNER: Yes, your Honor.

"Hirschmann Corporation is a distributor of machine tools that originate largely in Europe; distributor, also an engineer, an engineering company that advises its clients as to methods, as to manufacturing ideas; also a tool maker, to some degree, preparing tools for the machines we sell and a distributor of these machine tools on a nation-wide basis."

Now, page 5, line 14:

"Q Again directing your attention to the period around 1964, what was your particular connection" --

MR. STREAM: What page is this? I have got it, go ahead.

MR. GARTNER: Page 5, line 14:

jwesb 83 "Kaefer

"Q Again directing your attention to the period around 1964, what was your particular connection with Hirschmann Corporation?

"A My title at that time as now, as of now, is vice president, engineering."

Going to page 10, line 21:

"Q Now I would like you to address your attention to the year 1964" --

THE COURT: I'm sorry, this is page --

MR. GARTNER: Page 10, your Honor. Sorry, your Honor.

THE COURT: Line?

MR. GARTNER: Line 21:

"Q Now I would like you to address your attention to the year 1964 and tell me whether you recall having written a letter and having done an appraisal for a company then called Precision Time Corporation.

"A Yes.

On the next page, line 2:

"Q Let me show you what purports to be a Xerox copy of a letter dated July 1, 1964 from you to a Mr. Jacob Shriro and ask you to note only the letter and disregard for the purposes of this question what appears to be a calling card which was also photographed along with

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jwesb 84 "Kaefer

the letter itself.

"Looking at that letter, tell me whether you can recognize your signature and whether it isn't in fact a copy of the original letter which you sent.

"A The letterhead, the general tenor of the letter and the signature are all genuine."

That is Plaintiff's Exhibit 8-A in evidence, your Honor.

Line 19 --

MR. STREAM: Just a second. Hold it a second, please.

Okay.

THE COURT: All right.

MR. GARTNER: Line 19 on page 11:

Q" Notice, if you will" --

THE COURT: Wait a minute. You are back --

MR. GARTNER: Still on page 11.

THE COURT: Same page?

MR. GARTNER: Yes.

THE COURT: Line?

MR. GARTNER: Line 19, your Honor:

"Q Notice, if you will, there is an attachment to that letter which is headed, "Appraisal of Equipment of the Former Precision Time Corporation, Strasburg,

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

I believe I was on page 13 --

THE COURT: I thought it was 12.

MR. GARTNER: No, I finished with 12. 13, line 23:

"Q Well, in any case, putting aside the details of conversation, do I understand you to say that Mr. Shriro asked your company to do an appraisal?

"A Yes."

Page 14, line 3:

"Q What were you asked to appraise?

"A The equipment existing at the plant at Strasburg, Pennsylvania, used then for the manufacture of watch movements and auxiliary equipment for the manufacture of watches. I mean, you need a hammer in order to drive a nail."

Then on page 14, line 17:

"Q Were you assigned, Mr. Kaefer, to do that appraisal at Strasburg, you yourself?

"A I personally, yes.

"Q And did you in fact go down to Strasburg for that purpose?

"A Yes, for several days.

"Q Do you remember whether or not it was in the summer of 1964?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

hwesb 89 "Kaefer

"A It was preceding the date of this letter by not too much."

Now, on page 15, your Honor, line 17:

"Q What inspection and evaluation and appraisal procedures did you actually employ at that time and place?

"A At the time I made my examination of the plant, the plant was not producing. I don't know whether it was shut down then or whether it was on an off day, off days.

"Q Do you remember how long you were down there?

"A Several days, sufficient to gather considerable information."

Now, page 26, your Honor, line 17 --

THE COURT: Let me find the place, please.

MR. STREAM: What page is that?

MR. GARTNER: 26.

MR. STREAM: Just one minute, please.

THE COURT: What line, please?

MR. GARTNER: 17.

THE COURT: That is not a question.

MR. GARTNER: 26, line 17.

THE COURT: I say, line 17 is not a question.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

MR. GARTNER: It starts out, "Is there any way, Mr. Kaefer" -- is that the same question you have, your Honor?

THE COURT: No.

MR. GARTNER: You must be on the wrong page.

THE COURT: I apologize. This is 36 I have. I skipped twenty pages.

MR. GARTNER: No need to apologize.

THE COURT: I have to go back. I have page 26.

MR. GARTNER: Page 26, line 17:

"Q Is there any way, Mr. Kaefer, you can tell us what percentage of machinery and equipment that you examined in 1964 at that plant fell within the categories of the fine machinery that you described as distinguished from the categories of American companies mentioned at the end?

"A Percentage, dollar-wise, percentage number-wise?

"Q In any way that you find it most intelligent to answer.

"A I can answer it very intelligently by going through the individuals, but I can approximate it.

"Q Would you do that?

"A It was not five percent of value, that is,

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jweab 91 "Kaefer

of typical standard machine tools of American make.

"Q And the other 95 percent in value is represented by what kind of machines?

"A By machines originating in Switzerland bought specifically for the purpose of watchmaking.

"Q Would you be good enough to return to the first page and continue your explanation of the headings.

"You told us now about the location identification."

I think we should have here --

THE COURT: Do we need this, really?

MR. GARTNER: I will skip over to --

THE COURT: What page?

MR. GARTNER: -- page 28, line 14:

"Q And the meaning of the heading, "Market Value for Watch?"

THE COURT: Wait a minute, let me get that. 26 --

MR. GARTNER: 28.

THE COURT: 28.

MR. GARTNER: 28, line 14:

"Q And the meaning of the heading, "Market Value for Watch?" -- referring to Plaintiff's Exhibit 8, the Hirschmann report, the second column which is headed,

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jwesb 93 "Kaefer

THE COURT: You read from that, I believe.

MR. GARTNER: Yes.

THE COURT: All right. What's next?

MR. GARTNER: And the summary of appraisal values is what Mr. Stream was referring to before.

THE COURT: Never mind that. You go on and read.

MR. GARTNER: I show that to the jury; this ledger sheet.

Page 30, line 9:

"Q What is your total replacement value for that equipment?

"A As I see it from this list, it is $793,752.

"Q Is that replacement or market value?

"A That is market value.

"Q The market value, you say, is $793,752 at July 1964?

"A Yes.

"Q And how about the replacement value?

"A The replacement value here is listed as $1,214,056.

"Q Are those the values which you reported to your client, that is to say --

"A I presume, because this is the client's

jwesb 94 "Kaefer

book, the client's record.

"Q Was it your general practice, Mr. Kaefer, in doing appraisal work for your company to prepare the kind of appraisal report which you find at the end of that document marked Plaintiff's Exhibit 2 for identification?

"A I am not a professional appraiser.

"Q Well, had you done appraising work before?

"A In a very limited fashion, yes. This is the" --

THE COURT: What does this rebut?

MR. GARTNER: This rebuts the claim that this was an appraising done by a professional appraiser.

THE COURT: Go ahead.

MR. GARTNER: "In a very limited fashion, yes, this is the first big job and really the only job I ever did of this type."

Now, page 32, line 6:

"Q I would like you to give us, to the best of your present ability, your general --

"A Opinion?

"Q More than your opinion, the knowledge at your command developed and acquired by you from all of your exposure in the industry as to the status of the American watch industry at that time insofar as it had any bearing

jwesb 95 "Kaefer

on your appraisal and evaluation efforts at Strasburg in June 1964.

"A All right.

"Q Do you understand that?

"A Yes, I understand, but it is, of course, a much qualified question.

"The first question obviously is that in 1964 the fortunes of the watch companies in America were ebbing.

"Now, I made an appraisal for the use of this equipment for the production of watch movements of that caliber, caliber meaning in this case of that model, by somebody willing and capable of doing it, and I maintain that what I listed as market value for such a purpose is true and right.

"The party buying that equipment for the purpose of manufacturing the movements for which it was true at the market value would have bought at the right price."

Page 34, line 13:

"Q You will notice that the appraisal report ends up with a summary sheet, a summary sheet which you identified before.

"Do you recall that that summary sheet was indeed a part of the transmittal papers comprising

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jwesb. 96 "Kaefer

Defendant's Exhibit B?

"A By the type used, by the make-up of it and by recollection, I would say yes.

"Q Now --

"A I don't think anybody would forge a thing like this."

Page 35, line 15:

"Q Based, Mr. Kaefer, on your experience and expertise in the industry, do you have an opinion on whether or not the machinery and equipment found in those facilities in June 1964 depreciated to any substantial extent or would have depreciated to any substantial extent by the summer of 1966 if you assume reasonable regular maintenance and repair service?

"A Mr. Stream, you have to qualify what you mean by depreciation. Depreciation physically or depreciation in utility or depreciation in accepted choice?

"Q Let's ask you that question first from the point of view of a depreciation or a diminution in its utility or usefulness.

"A It would not have -- usefulness in the mode of the examination date would not have depreciated in the two years."

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jwesb 97 "Waefer

MR. STREAM: I suggest, your Honor, that that answer was read improperly and I ask the Court for leave to read it over carefully.

THE COURT: There was a pause there.

MR. STREAM: Let me read the question over:

"Let's ask that question first from the point of view of its depreciation or diminution in its utility or usefulness.

"A It would not have -- usefulness in the mode of the examination date would not have depreciated in the two years."

MR. GARTNER: Thank you, Mr Stream.

"Q How about depreciation in economical value?

"A Definitely.

"Q It would have?

"A It would have reduced itself in value because of the fact already stated that the watchmaking art was not exactly flourishing.

"Q Can you give us any approximation of the extent ot which in your opinion that machiner and equipment would have depreciated in value for the purposes at which you evaluated in 1964, that is to say, by how much would it have depreciated by 1966?

"A To do it fairly, you would have to do it

jwesb 98 "Kaefer

individually because some of the machines in that compound are practically the same today yet, but some of them are now considered more obsolete in method.

"Q Perhaps we don't understand each other, Mr. Kaefer. I am interested in having your opinion based upon your own experience and expertise on whether or not there would have been or was assuming reasonable and regular maintenance and repair service, any material depreciation in the market value of that machinery and equipment in-place between 1964 and 1966.

"A I'm sorry, the fact cannot be separated from the physical and economic situation.

"Q I am not trying to separate it from the economic situation.

"A I do.

"Q I am asking you to consider it within the period 1964-1966, not today. That's all I am asking of you.

"A I am not talking of today.

"Q Let me have your answer with respect to 1964 to 1966 and tell me, if you can -- you told us a moment ago that some of it would still be as good today as it was then.

"But what I am interested in finding out from you, if you can tell us, is whether you, with any degree" --

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jwesb 99 "Kaefer

MR. STREAM: Slower.

MR. GARTNER: I apologize, I am trying to save time.

MR. STREAM: Don't save it at my expense.

MR. GARTNER: I'm sorry, Mr. Stream, I know you read these questions with more feeling when you gave them.

"What I am interested in finding out from you, if you can tell us, is whether you, with any degree of accuracy can say what percentage of reduction in the overall economic value of this equipment appraised by you in 1964 as having a market value of $793,000 more or less, how much less or more change, if any, would have taken place in that value, assuming ordinary maintenance and repair by the summer of 1966.

"A I would be presumptuous in giving you a snap figure. It would have to be carefully analyzed, historically, economically, plus the little side detail of mechanically.

"Q Do I understand, dir, that you cannot make that judgment or give that opinion at this time?

"A You know what is meant by a ball-park figure?

"Q Yes.

"A I can ball-park it but I can't swear to it

that it is right.

"Q I am not interested in anything except your own best estimate.

"A It is not my best estimate. It is a ball-park estimate. It is a ball-park estimate, you know what I mean. My best estimate is based on research and analysis. My snap judgment or ball-park estimate is something else. That's intuition. And I would like to, usually in my work, handle it precise.

"Q Are you able to tell us this, Mr. Kaefer:

Can you tell us again based upon total values what percentage of the precision equipment that you have -- that you saw and examined done there, and is listed in this report, would have remained in substantially the same useful form and would have held the same economic value in 1966 that it had in 1964? Can you do that?

"A You use the word 'economic' and economic has to be qualified.

"Q Let's say market value.

"A It deteriorated.

"Q Let me ask you whether or not some of that machinery and equipment would not have remained at the same market value.

"A Some of it has not.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

"Q Whether some of that machinery would not have remained at the same market value in 1966 as it was in 1964.

"A Right.

"Q What percentage of all the equipment would have retained its market value during that two-year period?

"A Mr. Stream, do you want a ball-park figure or do you want a figure, a careful figure?

"Q I would like your best estimate on the percentage basis if you can give it to us.

"A All right. I can give you my figure qualifying it as a ball-park figure.

"Q I am looking for a percentage now.

"A I will give you a ball-park figure, a ball-park percentage, but I qualify it to the record that it is not the result of careful study. It is intuition retroactively applied for a period of degree of deterioration of the market value, 1964 to 1966.

"Q Do you understand the question?

"A I phrased it so I should understand it.

"Q Let me say it again to be sure you understand it.

"Can you give us in your opinion a

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jwesb 102 "Kaefer

statement of that" --

MR. STREAM: Read the questions slowly, counsel, please.

MR. GARTNER: "Can you give us in your opinion a statement of that percentage of all of the equipment that you examined which would have retained its market value at the same level in 1966 as it was in 1964?

"A 75 to 80 percent.

"Q Thank you.

"A And again I state it is a ball-park figure."

MR. GARTNER: Now we will go to 41 --

MR. STREAM: May I ask, please, for the sake of clarity, that counsel read the question and answer which start at line 16 of page 40? And just continue down to the middle of the next page because I'll read it anyhow.

MR. GARTNER: I have no objection.

THE COURT: Line 16, then, go ahead.

MR. GARTNER: Yes, your Honor.

"Q Will you be good enough to examine the sheet to which I now refer you comprising of one of the sheets in the appraisal report now marked Plaintiff's Exhibit 2 for identification and tell us, if you can, please, the meaning of the first paragraph of that sheet?

"A The paragraph reads, 'The basic equipment corresponds to the best type available short of the fully automated equipment specifically designed for high production.'

"Q What did you find down there that led you to reach -- first of all, excuse me -- is that expression an expression of the conclusions and opinions that you reached during that survey?

"A Yes.

"Q And what was meant by that? Can you explain

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

that?

"A I think the English is fairly clear. It means that the equipment was the best available short of -- I used the same term then -- the best equipment available without going to the then existing full automation lines.

"In other words, for the type of production that Precision Time had instituted or the type of labor they employed for the type of expertise and supervision and technology that they had at their disposal, I considered the equipment excellent."

The next question is line 22:

"Q Mr. Kaefer, you just testified a few minutes ago" --

THE COURT: This is an examination by Mr. Gartner?

MR. GARTNER: At this point, I took over the examination. Mr. Stream had been examining up to that point.

MR. STREAM: This, your Honor, is cross-examination.

MR. GARTNER: This cross-examination.

THE COURT: In effect.

MR. GARTNER: Line 22:

"Q Mr. Kaefer, you just testified a few

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

minutes ago that it was your ball-park estimate that in the period from 1964 to 1966, perhaps 75 to 80 percent of the equipment which you examined at Precision Time would what? Would have retained their value?

"A The way the question was put to me, that was the interpretation. In other words, the value given would have perhaps shrunk down to 75 to 80 percent by 1966, and again I state ball park.

"Q I thought that is what you meant. That is why I asked the question.

"A You can ask the statement or the statement to me, my aspect."

MR. GARTNER: Now, the next question is on 14.

"Q In other words, you are saying that where you gave a value" --

MR. STREAM: Just a second, sir. Would you be good enough to read the question ahead of it?

MR. GARTNER: Of course. It is explained later on.

THE COURT: What line is it?

MR. GARTNER: Line 11:

"Q But for the purpose of clarification, we want to be absolutely sure we understand what you are saying.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jbesb 106 "Kaefer

"A Yes. On the upside, not on the downside.

"Q In other words, you are saying that where you gave a value of approximately $790,000 for the market value for watch use of this equipment, that two years later that same equipment would have been worth approximately $625,000?

"A Yes.

"Q And you say that $600,000, depending upon which percentage you use?

"A Yes."

MR. GARTNER: Do you want me to continue?

MR. STREAM: That is enough for me, thank you.

MR. GARTNER: Then we will turn over to 43, line 6:

"Q In other words, you are saying that the value would be 75 to 80 percent?

"A I think this was the purpose of your question, to qualify whether it was the upper figure or the lower figure.

"Q Yes, exactly. So your ball-park figure, as you say, would be somewhere around $600,000 in 1966 for this equipment?

"A Again, qualifying it as ball-park figure, given now."

Now, page 44, line 24:

"Q When you indicated that the market value for watch -- for equipment by which we are talking was what you indicated on the exhibit which has been marked, what type of sale were you contemplating and how would that equipment be sold in order to produce --

"A To bring that value to a party interested in maintaining the manufacture of the specific watch caliber by --

"Q Which those machines were designed to make?

"A Yes, and which the tooling was -- don't forget the tooling is very important in this -- by an organization very similar to the then existing Precision Time organization.

"In other words, if I want to qualify that or explain it a little bit further, General Motors would not have bought the engine line from Packard when Packard gave up. But some of these engine lines were successfully sold to South America, to Germany, et cetera."

Now, page 46.

MR. STREAM: I don't think so. I think we should read through and not skip.

THE COURT: Where are we back to now?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

MR. GARTNER: I have no objection.

We are back to 45, line 18:

"Q Some of them wanted to make a Packard?

"A Yes, similar in mode and setup and volume to what the company had. This is more or less obvious if anybody -- period.

"Q Yes. Would the Hirschmann Company have paid the price which you set for this equipment?

"A No.

"Q How much would the Hirschmann Corporation have paid for that equipment?

"A Much of it we would not under any circumstances have acquired it.

"Q How much, approximately, 50 percent or --

"A How much? Let's say it this way to qualify it:

"We are in the market not to sell used machinery. We have no outlets for it. We do it occasionally as an accommodation to a customer who trades it in for a new model but, generally, we do not deal in used machinery.

"Q I see. Did you attempt to make any evaluation at the time that you made your appraisal of what that machinery would be worth as used machinery?

"A In --

jbesb 109 "Kaefer

"Q To a dealer who dealt in used machinery?

"A I did not.

"Q Would that figure be less or more than the figure?

"A That figure would be so minimal, it would be horrid.

"Q Well, when you say horrid, would you give us some estimate of what that figure would be?

"A Let's qualify this. The fact is that the equipment is specifically watch, specifically designed to do that purpose and to do that purpose well."

THE COURT: How many more pages have you got here to read? Just approximately.

MR. GARTNER: Approximately thirteen or fourteen. Not all entire pages. Thirteen or fourteen selections.

THE COURT: Leave out something wherever you can.

MR. GARTNER: Well, I am but then I am asked to put more in.

THE COURT: There is no gain in that, then.

MR. GARTNER: I know.

"A Let's qualify this. The fact is that the equipment is specifically watch, specifically designed to do that purpose and to do that purpose well.

"Now, in a market that where there is a decline of watch manufacturing industry, there is therefore within the watch industry not exactly a market for : and for anybody else, it has practically no market.

"Now, in percentage-wise, there are certain machines in there that could be adapted to other things and I dare say 25 percent of it could be, again, ball-park-wise, assumed to be a figure that is tenable.

"Q In other words, 25 percent of the approximately $790,000 would be the figure which you would guess or assume or estimate as the value of this machinery for -- as used machinery?

"A What is value?

"Q Well --

"A I said it differently.

"Q I am sorry. You say it however you please.

"A Whether it is realizable."

THE COURT: No, "reliable."

MR. GARTNER: It was changed.

MR. STREAM: I did not correct your copy, your Honor. It was changed.

THE COURT: All right. It is realizable.

MR. GARTNER: Yes, your Honor.

"Q Very good. I am glad you make the

correction.

"In other words, is it your testimony that if this machinery which you appraised under the heading of market value for watch, approximately $790,000 was to, at that time, was to have been sold as used machinery without the specific -- without a specific purchaser buying it for the specific purpose of manufacturing the very watches or similar watch for which that machinery was intended, that the realizable value of that machinery would have been approximately $200,000?

"A Yes.

"Q Now --

"A For this reason. This is qualified within the statement and within the term market value for watch use."

Page 50, line 15:

"Q I believe I have accurately written the statement which you made in the course of your testimony. I just want to clarify one word.

"In response to a question by Mr. Stream, you said, 'This is the first big job of appraisal, really the only big job I did.'

"My only question is, when you said 'this,' I take it you meant the job at Precision Time?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jbesb 112 "Kaefer

"A Yes. In other words, we are not professional appraisers and the method of going about it shines through to the whole documentation and through my testimony. I am sure that the usual professional appraiser would have done a faster job than I did."

Now, page 54, line 6:

"Q Mr. Kaefer, do you know a Mr. Jesse Thaler?

"A Do I know him?

"Q Yes.

"A I met him, I guess, once or so. Once or twice.

"Q When did you meet him?

"A He came to our place at one time and wanted to get some -- I forget now what the details were.

"Q When was that? Do you recall?

"A About two years ago, a year ago or so. I don't know."

May I call the jury's attention that the deposition was taken on January 7, 1970:

"Q What was the conversation you had with him at that time?

"A Merely that he wanted to have further insight into the appraisal of 1964 and I --

"Q Was that the first time you met him?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

"A As far as I know, yes. I can't tell you -- you see, in the course of a year, I meet probably 10,000 people and --

"Q You have no recollection of having met Mr. Thaler before the most, two years ago?

"A That's right.

"Q Do you have any recollection of having had any conversation with him before that time?

"A I couldn't say that either.

"Q You have no recollection of a conversation with him in 1964, for example?

"A Thaler, as such, is not associated in my mind with this thing but let's say it this way, my memory of names is not superb. Ask me about technical things and I --

"Q I may ask you a few more questions about that before I finish.

"A You should.

"Q But at the moment, I would like to know whether in -- when was the first time you heard the name of Industrial Plants Corporation?

"A To be honest, even today Industrial Plants Corporation means nothing to me.

"Q I see."

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

There is a correction here which I will read:

"A I didn't look into it. I had no reason to do it."

THE COURT: What is inserted? "I had no reason" --

MR. GARTNER: "I had no reason to do it." It says, "I didn't believe myself on it."

It is obviously a mis-transcription and the witness corrected it.

"I had no reason to do it."

Let me go back since it is broken up:

"A To be honest, even today Industrial Plants Corporation means nothing to me.

"Q I see.

"A I didn't look into it. I had no reason to do it. I didn't know who they are or what they are doing, whether they are merchants or undertakers or doctors. I have no idea."

Now, on page 56, line 8:

"Q And I believe you have testified that you did not have any conversation with Mr. Thaler, Jesse Thaler, in 1966.

"A Yes, I did.

"Q In 1966?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jbesb 115 "Kaefer

"A No, not '66, no, not that I know of. I think Thaler came into the discussion sometime last year or the year before.

"Q You mean that was the first time you have any recollection of having --

"A Having any recollection of having conversation with him.

"Q When you say that he wanted to get more specifics, I think was your word, about the 1964 appraisal, exactly what was it that he asked you?

"A That I can't tell you any more. It is my recollection that he said, 'I am here to discuss this appraisal you did sometime ago for some association.'

"I said, 'Yes, I recall that,' and I was not about to volunteer too much information because, number one, I did it on behalf of a client, period.

"Q Mr. Shrior or Precision Time?

"A Right. But I didn't pursue the matter further, whether I have the client's permission to discuss it or anything else, until the subpoena came.

"Under the subpoena, I am, of course, obligated to tell the facts of the case, which I am doing, but I would not have volunteered to give any information to a third party any time."

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jbesb 116 "Kaefer

Now, page 64, line 15, your Honor, and this is by Mr. Stream, redirect:

"Q You told us --

"A Yes?

"Q -- a short while ago in answer to a question by Mr. Gartner, that your evaluation was made from a point of view of determining market value for a person, I think you said, who intended to use the facilities for the intended purpose.

"Do you remember testifying in that subject?

"A More or less can be accepted as a statement.

"Q Do you remember being told or asked to make your appraisal on that basis?

"A Mr. Stream, if --

"Q It might be helpful and quicker if you just tell me yes or no.

"A I presume --

"Q Do you remember specifically?

"A Specifically I cannot say but I delivered a document with that statement.

"Q Mr. Kaefer, at this point, I am going to ask you to be good enough to answer the questions directly.

"A Yes or no.

"Q It will save so much time if you do that.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jbesb 117 "Kaefer

"Do you remember whether you were instructed to do your appraisal from the point of view of determining market value to a person who might buy the plant facilities for the purpose of manufacturing watches and watches only? Do you remember being told that? Yes or no.

"A No, I don't remember."

The next page, 66, line 9:

"Q You said, did you not, during your cross-examination at the instance of Mr. Gartner, that your market value was a market value intended to determine that value from the point of view of a person who would use the facilities there set up to make watches.

"Do you remember so testifying?

"A Yes.

"Q Did your appraisal have that in mind and that in mind alone?

"A Yes.

"Q Could that equipment have been used, was it useful for the manufacture of other precision instruments?

"A Some items, yes."

MR. STREAM: Will counsel please continue on page 67 at line 5? Thanks.

MR. GARTNER: 67?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jbesb 118 "Kaefer

"Q Is it your testimony, sir, that the equipment in those plant facilities could be used only for the manufacture of watches?

"A You want a yes or no answer that the equipment can only be used? That is not so. You can with a pocket knife --"

Do you want me to continue?

MR. STREAM: Please, yes, of course I do.

MR. GARTNER: I take it this is not charged against my time:

"Q There is other precision instrument manufacturing being done through the use of such machinery, is there?

"A Yes."

MR. STREAM: Thank you. That is as far as you need to go for me. Thank you.

MR. GARTNER: Page 74, line 7.

Now, again, I am questioning on redirect -- or rather it is recross:

"Q Mr. Kaefer, did you make any examination or investigation in 1965, 1966, as to the value of the equipment which was listed in your appraisal of Precision Time Company?

"A Do you mean did I rehash it?

"Q That is one way of phrasing it. Did you make any examination?

"A Not that I recall.

"Q Do you know what the market value for watch use was in 1966 of the Hauser 2-spindle profile miller?

"A Mr. Gartner, that happens to be one machine type that is in the obsolescence category. That comes under the 20 percent.

"Q That you think in 1966?

"A Had gone down considerably because Hauser in the meantime bought out some new machines.

"Q I see.

"A That doesn't mean that you cannot use the old machines but market value --

"Q Had gone down considerably in 1966?

"A Yes.

"Q What about a Mikro horizontal single spindle profile miller? Do you know what the market value for a watch --

"A Same thing applies.

"Q As for --

"A What I said about Hauser. You are getting into very, very specific machines."

On page 76, line 19:

"Q What about a Billeter type-1 engraver, do you know what the market value for watch use of that machine was in 1966?"

There is an interruption.

"Q What about Billeter type-1 pedestal, is that a machine that you recognize?

"A Yes.

"Q Do you know what the market value for watch was of that machine in 1966?

"A At this point, I don't know what the market value was at that time. I had records when I set the market value originally. Now you are asking me eight years after the process to recall the market value at a specific date in history."

The next question on line 20, page 77:

"Q What about a Gruen recess and boring machine pedestal, is that a machine --

"A Made by Gruen" --

MR. STREAM: Your Honor, I object. I think I will object on grounds of irrelevancy and immateriality.

MR. GARTNER: Well, I have only one more page.

THE COURT: How is this relevant here?

MR. GARTNER: This has to do with the specific

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jbesb 121 "Kaefer

value of the machines. Mr. Stream was complaining that there was no evidence --

MR. STREAM: Just a second. I won't let him finish that kind of a remark. How dare he.

THE COURT: Listen, don't quote Mr. Stream.

MR. GARTNER: I'm sorry, your Honor. But he asked for the relevance.

THE COURT: But you did not need to bristle up about that.

MR. GARTNER: I am not bristling up. I am simply responding to the question.

MR. STREAM: Let him read it. I'll withdraw the objection.

THE COURT: You may disregard that, members of the jury.

MR. STREAM: Read it.

MR. GARTNER: Thank you.

THE COURT: Get through to the end of this. Where are we now?

MR. GARTNER: Page 77, line 20:

"Q What about a Gruen recess and boring machine pedestal, is that a machine --

"A Made by Gruen or for Gruen completely obsolescent even at that time.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

"Mr. Stream: At what time?

"The Witness: '64 or '66.

"Q Now --

"A But suitable for the purpose intended.

"Q I see. It was your opinion that it would have a lesser value in 1966 than it had in 1964?

"A It has because it was on the downgrade of the slide.

"Q And you indicated a very sharp downgrade by your motion?

"A We said so sometime ago.

"Q Yes. Mr. Kaefer, what about a Billeter type-1 profile miller bench, do you have any idea what the --

"A Billeter profile miller --

"Q -- in 1966 was --

"A -- that is definitely in the higher eclipse.

"Q In other words, its value in 1966 --

"A Was much less than in 1964."

THE COURT: You see, this constant situation with respect to the answer intervening in the question is somewhat difficult for all of us, including the reporter.

MR. GARTNER: Yes, your Honor.

"Q Much less than in 1964?

"A Yes.

"Q What about a CIH single spindle profile miller pedestal machine?

"A CIH is a company which is a French company that made these things. Its value -- it is relatively a small machine. What is the value given?

"Q Please forgive me if I won't tell you. I want to know if you know.

"A I know the machine but I don't know what its value is relatively.

"Q Do you know what its value was in 1966?

"A As compared with 1964?

"Q Yes.

"A It had -- we have so far picked all specific watch equipment for specific operations and the further away you got from the target date the faster the decline of the market value.

"Q So that in this machine, too" --

THE COURT: Where are you now?

MR. GARTNER: 79, line 14.

THE COURT: You might tell us once in a while.

MR. GARTNER: I am just reading continuously, your Honor.

THE COURT: Even though it is so, when you skip

to another page, I wish you would tell us.

MR. GARTNER: All right, your Honor.

Page 79, line 14:

"Q So that this machine, too, would have been worth considerably less in 1966 than it was in 1964?

"A Right."

The last page I have is 82, line 7:

"Q Mr. Kaefer, in 1966, how far had the American watch industry proceeded to using full automated machinery?

"A I am not cognizant of the interior development within the watch companies. That's hard to say. At that time already they were leaning heavily towards importation.

"Q Of fully automated machinery?

"A No.

"Q Of what?

"A Of watches.

"Q Not machinery at all, is that what you are saying?

"A We are -- in the '60s, we were in the era of the decline of the American watch industry so that today it has progressed so far that there is practically none existent."

MR. GARTNER: That's all I have to read, your Honor, on this deposition and I would like in final rebuttal to read two or three pages from Mr. Thaler's deposition.

MR. STREAM: No. I am going to -- gee whiz --

THE COURT: Don't tell me what you are going to do. Just do it, please.

MR. GARTNER: Thank you, your Honor.

MR. STREAM: May I be given an opportunity to read a couple of lines?

THE COURT: Yes, in this one from Kaefer, whatever it is.

MR. STREAM: Really, just a couple of lines.

THE COURT: What page, please?

MR. STREAM: I would like to read from line 21 on page 4:

"Q Addressing yourself to the period around the year 1964, did your company do any distribution work for manufacturers of precision" --

THE COURT: Wait a minute. Let me catch up with you.

"Q Addressing yourself to the period around the year 1964, did your company do any distribution work for manufacturers of precision equipment or watchmaking

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

equipment?

"A Our company is rather unique and it is a mix or make-up of the equipment we sell. The majority of our equipment comes out of Switzerland and more specifically out of the very narrow little area known as the watch area of Switzerland."

MR. STREAM: That's all.

THE COURT: You are very modest.

MR. GARTNER: Good. A modest quotation.

May I now read a final section from Mr. Thaler's deposition, Volume 2, page 310.

THE COURT: I don't have it but read it anyhow. Whatever you modestly think should be read.

MR. STREAM: Hold it, sir. Here is a copy for the Court, an extra copy.

MR. GARTNER: All right. It is 310, line 10:

"Q As a matter of ordinary and normal business, has Industrial Plants ever guaranteed the price of any machinery?

"A Occasionally.

"Q What is your practice as far as the form of guarantee is concerned?

"A We guaranteed a certain minimum or floor figure.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jbesb 127 "Thaler

"Q Have you been involved in any such guarantee?

"A No.

"Q Do you have any knowledge of how that minimum or floor figure is fixed?

"A Usually it is fixed by the evaluation of the equipment and some figure below that as a minimum guarantee.

"Q Who makes the evaluation of the equipment?

"A Either Mr. Kriser or --

"Q Sidney Kriser?

"A Yes, Sidney Kriser or Botwinick.

"Q Who determines what the guarantee figure should be?

"A Mr. Kriser usually.

"Q Sidney Kriser?

"A Yes."

On line 25, page 311, your Honor:

"Q Do you have any knowledge about how Industrial Plants or Mr. Kriser determines the guarantee figure in relation to the evaluated figure?

"A The evaluated figure is what the equipment would bring if sold at liquidation or public auction sale

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

and then from that figure is deducted the cost of conducting such an auction sale or liquidation; then the factor of a split beyond the minimum and the evaluation that was made. Sometimes it is fifty/fifty, sometimes it is sixty/forty, between the minimum and what the machines bring net or the plant brings net.

"Q I am not sure that I understand that. What do you mean by a split? Let us go into specific figures.

"A All right. Suppose a plant is evaluated at $100,000.

"Q Yes.

"A That is what it is contemplated to bring.

"Q Yes.

"A It may cost $7500 to $10,000 to put this plant into such a condition that the machinery contained therein can be marketed and sold.

"Then there is a figure that is established as to what normally -- what the profit should be, since it is like an investment. You are actually buying. Sometimes the guarantee is made in such a manner between Industrial Plants Corporation and the principal that after the minimum guarantee there is a split of the proceeds.

"Q Between Industrial Plants and the principal?

"A Yes.

"Q Which split may be forty/sixty, you say?

"A Forty/Sixty, Sixty/forty or less. It depends upon what the arrangements are.

"Q Using those figures that you have postulated, the machinery being evaluated at $100,000 and assuming that it would take $10,000 to prepare it for sale, what would be the minimum guarantee which Industrial Plants would offer to the principal?"

MR. STREAM: I object to the form of the question. It calls for a conclusion. It is hypothetical.

MR. GARTNER: Your Honor, objections as to form were waived on this deposition.

MR. STREAM: This is not an objection as to form. It calls for a hypothesis.

MR. GARTNER: You said it was an objection as to form and they were waived.

THE COURT: Are you objecting to form?

MR. STREAM: No, your Honor. I am objecting as to the substance of the question. It is based upon a hypothesis and the answer is a hypothesis.

MR. GARTNER: It is based upon --

THE COURT: Sustained. I think we have gone far enough on this one.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jbesb 130 "Thaler

MR. GARTNER: It is based upon the hypothesis that Mr. Thaler gave. It is not my hypothesis.

THE COURT: Whose question is it?

MR. GARTNER: It's my question but it's his hypothesis. This is the final question in the series and it explains everything he said.

MR. STREAM: I still object. I couldn't care less that it explains.

THE COURT: Don't express your emotion about it.

MR. STREAM: All right.

MR. GARTNER: He was talking about the split and what the figures were and this is where he gives the final figures. It's his postulation.

THE COURT: All right; I'll take it.

"A In that case, it would be, as I say, $100,000; it would be $65,000, $70,000, as the minimum guarantee."

THE COURT: Now, are you finished?

MR. GARTNER: Now on page 313 --

THE COURT: I thought you were getting to a close here.

MR. GARTNER: That was the end of that series and I am about finished, your Honor. I think I have two more questions.

THE COURT: All right. Don't go above two.

MR. GARTNER: Three; I'm not sure.

THE COURT: 313?

MR. GARTNER: Well, I don't -- I mean, I may be asked to read another one.

THE COURT: Well, that hasn't occurred yet.

MR. GARTNER: Oh. It hasn't?

THE COURT: 313.

MR. GARTNER: 313, line 25.

"Q At the time that Mr. Kriser offered this guarantee of $350,000 to Mr. Klein in his letter of August 30, 1966, Plaintiff Exhibit 22 for identification" -- that's Defendant Exhibit K here -- "had Industrial Plaints arrived at any liquidation value of the machinery at Time & Micro?

"A They undoubTedly must have in order to come up with a guarantee."

MR. GARTNER: That's all. Just one question.

THE COURT: Okay. You did better than anticipated.

MR. GARTNER: That's all I want to read, your Honor.

THE COURT: Very well. How about any other questions by you, Mr. Stream?

MR. STREAM: I have nothing, your Honor. It's

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

his rebuttal.

THE COURT: Both sides rest?

MR. GARTNER: Yes, your Honor, and at this time I have a motion. Perhaps it should be made out of the presence of the jury.

THE COURT: I'll have to excuse the jurors.

You may retire for a little while. It's three o'clock now.

(The jury left the courtroom.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jwesb 133

THE COURT: The first thing I want to do, and I am going to do this now, is determine the motions made by Mr. Stream this morning. Let me say that I have deliberated on those motions.

As far as the first two are concerned, the first one is breach of contract; the second is negligence. Although the motions set forth by Mr. Stream are somewhat in order, I deny each of those, the breach of contract motion and the negligence, because of the condition that I believe tnat issues of fact are concerned.

As to the motion in respect to the fraud claim or count, I reserve, as to punitive damages, I reserve.

What is your motion?

MR. GARTNER: Thank you, your Honor. My motion at this time is a motion for a directed verdict.

THE COURT: For the defense?

MR. GARTNER: For the plaintiff.

THE COURT: Denied. I cannot do that.

MR. STREAM: The same motion by the defendant, your Honor.

THE COURT: If they are related to different causes of action, they will follow my previous decisions on that.

Breach of contract denied, negligence denied,

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jwesb 134

fraud reserved, punitive damages reserved.

All right.

MR. GARTNER: Thank you, your Honor.

THE COURT: Now I am going to say this: Counsel for the defendant -- I believe, Mr. Stream, you asked for an hour and a quarter, is that it?

MR. STREAM: At the most, your Honor. I doubt I will go past the hour.

THE COURT: Counsel for the plaintiff has asked for two and a half hours. That is unreasonable and unfair --

MR. GARTNER: Then I --

THE COURT: Just a minute, please. You asked for it and I am going to tell you.

MR. GARTNER: Thank you, your Honor, I thought you asked for my opinion.

THE COURT: No, I am not going to entertain any comment by you. I am going to allow an hour and a half by each counsel, that's all.

MR. GARTNER: Your Honor, can I ask for more? It is a very complicated case.

THE COURT: I am not going to ask for summations today. You have a right to write out your statement. The more time you have, the less time the

jwesb 137

Exhibit 1.

THE COURT: Let's see it. When was that marked, here?

MR. GARTNER: Yes, yes, and I simply would ask that it be marked as --

THE COURT: Do you agree to this, counsel?

MR. STREAM: Sure, I am happy to see that doesn't go to the jury.

I guess it just makes for purposes of appeal.

THE COURT: Do you offer to withdraw it from the jury?

MR. GARTNER: I would just like to withdraw it from the jury, yes, but to leave it --

THE COURT: Exhibit 1 is withdrawn in this case.

MR. GARTNER: All right, thank you.

THE COURT: It is not a part of this case, this trial.

Anything else?

MR. GARTNER: Thank you, your Honor.

THE COURT: Now I want to pass out, have marked first the original -- where is the original, Mr. Clerk?

(Court's Exhibit 2 marked.)

THE COURT: Each party will now get a copy. And will you look at it and see if there is any substantial

xxx

jwesb 138

suggestion; nothing but that.

(Pause)

MR. GARTNER: I have no objection, your Honor. It looks fine to me.

MR. STREAM: No objection from the defendant.

THE COURT: All right, very good, very good. So be it.

MR. STREAM: How about that, your Honor, we both agree.

THE COURT: Very well. Thank you.

MR. GARTNER: If we continue with this a little longer, I think we will all reach agreement.

THE COURT: Maybe there will be some money paid and accepted.

MR. GARTNER: Oh, well --

THE COURT: On a reduced basis of the client.

MR. GARTNER: I am willing to give up ten dollars.

THE COURT: That is what you call infinitesimal.

Very well. Ten o'clock tomorrow morning, but 9:30 to counsel to fix up the exhibits, as you said.

MR. GARTNER: Yes, thank you, your Honor.

THE COURT: Let the jurors back in and I will excuse them.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jb-1

AJAX

vs

INDUSTRIAL

Levet, Jr.

CLERK'S

69 Civ 1900

April 30, 1975
9:50 a.m.

(Trial resumed.)

(In the courtroom, jury not present.)

THE COURT: Now, does each attorney have both his own requests and that of the adversary?

I shall first state the determinations on the plaintiff's requests and I have numbered these, Mr. Gartner, the supplemental, continuously after the original ones. The purpose is for identification.

Number 1, granted as charged. 2 and 3, the same.

Number 4, refused except as charged.

If you don't hear me, speak up.

MR. STREAM: What did your Honor say as to 4?

THE COURT: Refused except as charged.

5, 6 and 7 are each granted as charged.

8 is refused except as charged.

MR. GARTNER: I'm sorry. You are going too fast, your Honor.

THE COURT: All right. 8 refused except as charged.

9, the same; refused except as charged.

10, the same; refused except as charged.

11 and 12, granted as charged.

13, granted.

14 is granted as charged.

15 is granted as charged.

16, granted.

17, granted as charged. 18 and 19, the same; and 20, the same. That is, granted as charged for 17, 18, 19 and 20. 21. All granted as charged.

22, refused except as charged.

MR. GARTNER: Excuse me, your Honor. It's much too fast.

THE COURT: Well, all right. Do you want me to go back at all? I'll go back to 21.

21, granted as charged.

MR. STREAM: Excuse me, your Honor. I don't have a 21 in the set I have.

THE COURT: It's the first one of the supplemental. As I said, I have had to number them for purposes of identification, consecutively, after the originals.

MR. STREAM: I understand, your Honor.

THE COURT: 22 is the next one -- refused except as charged.

23, granted as charged.

24, refused except as charged.

25, ditto -- refused except as charged.

26, 27, 28, granted as charged; that is, as to 26, 27 and 28.

29, refused except as charged and 30, the same.

Now I wish you would put on any exceptions as to my rulings. First, Mr. Gartner. Do you want to wait a little while?

MR. GARTNER: Judge, I am afraid I don't even have them recorded. It was just too fast.

THE COURT: I don't know why you can't write it down. It's all you have to do. You want me to repeat the whole thing?

All right. I'll ask the reporter to read and see if you can keep up with him. If you can't, just say so and he'll stop at any time at my request.

Now, go ahead.

(Record read.)

THE COURT: Now, Mr. Gartner, any exceptions?

MR. GARTNER: Your Honor, I must ask the Court what the Court means when it says "refused except as charged" or "granted as charged." There is no --

THE COURT: "Granted as charged" means that the substance of it is probably granted, at least in part. "Refused except as charged" means that it is refused except

as charged. I cannot portray all of my rulings in a complex case like this with the degree of specificity that you might like. You may take exceptions to --

MR. GARTNER: With respect, your Honor, --

THE COURT: Take your exceptions now to what you wish to do.

MR. GARTNER: I must except to all of the rulings except those which were granted because --

THE COURT: Very well, if that is your statement; so be it.

MR. GARTNER: I don't know what --

THE COURT: So be it.

MR. GARTNER: Thank you, your Honor.

THE COURT: Now, Mr. Stream, will you state any exceptions to these rulings on plaintiff's requests?

MR. STREAM: I take exception, your Honor, respectfully, to the Court's indication that it will grant as charged Instruction 19, upon the ground that the issue --

THE COURT: Wait a minute. 19? Yes. Any other?

MR. STREAM: On the ground that exemplary or punitive damages is not an issue which properly should be submitted to the jury.

THE COURT: Yes.

MR. STREAM: I take exception to that portion of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Instruction 8 --

THE COURT: That was refused except as charged.

MR. STREAM: Yes, and to the extent that the Court may charge to the jury the law on fraud, that being an issue which in my respectful view is not appropriately --

THE COURT: Well, you have already made your position on it by your motion. You don't need anything further.

MR. STREAM: I am just concerned that the charges will present those issues to the jury.

THE COURT: I have to, ruling as I have, counsellor. Don't misunderstand me.

MR. STREAM: All right. In those circumstances, I have no other exceptions to the charge.

THE COURT: Very well. Now, I pass to the defendant's requests -- I hope. Yes; here they are.

1, granted as charged.

9 -- I don't know how this comes -- 1 is the same as 8, I believe.

9, refused except as charged.

10 is granted as charged; as 11, 12 13 and 14.

15, refused except as charged.

10 is granted as charged --

MR. STREAM: What number, sir?

THE COURT: 16. I misread the number . 16 is

jb6

granted as charged.

17 is granted as charged.

18 is refused.

19 is refused except as charged.

20 is refused.

21 is refused.

Now, there is a second page of these. You deluged me with requests.

22, granted as charged.

23, refused except as charged.

24, refused.

25, granted.

26, granted as charged. The same for 27, 28; granted as charged.

29 refused except as charged. 30 the same; that is, refused except as charged.

31 is refused.

And we have, I believe, two supplemental requests which I have renumbered.

32, granted as charged.

33, refused except as charged.

Now, do you have yours, Mr. Stream?

MR. STREAM: Yes, I do.

THE COURT: Any exceptions by you?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

MR. STREAM: The only exceptions that I make, your Honor, are to those items in my requests for instructions which the Court refused outright.

THE COURT: All right. Let's see which ones those are, so I will make a list of them.

MR. STREAM: I will read those to the Court. Those are 18, 20 --

THE COURT: Wait a minute. 18 was granted as charged.

MR. STREAM: I didn't have it that way. If 18 is granted as charged, then I have no exception to that. 20.

THE COURT: 20 is granted as charged.

MR. STREAM: I have no exceptions to that, then. 21.

THE COURT: 21 is granted as charged.

MR. GARTNER: Your Honor, you may be reading from the other rulings. Could we have the reporter read these because --

THE COURT: Let me see what I have here. All right. I'll do it. I don't object to doing it. I should do it.

Wait. Which one are we on? 21?

MR. STREAM: 18, your Honor.

THE COURT: What did I have on that?

jb8

(Record read.)

THE COURT: What do you say about that?

MR. STREAM: I take exception to the Court's ruling on that and I understand the Court refused 20, which begins with the words "in your deliberations."

THE COURT: Well, I am very much astonished that the record which I received from my clerk, after my reviewing it with him, does not cover 20. I shall have to look at it.

MR. STREAM: 20 -- on the long sheets, your Honor. They are the defendant's requests.

THE COURT: Well, let me find 20. If your papers have numbers I won't have much trouble with it. I have got to find them in your papers.

I have it now. Refused except as charged.

MR. STREAM: Then I have no objection to that. 21, I understand the refusal was outright.

THE COURT: Granted as charged.

MR. GARTNER: Your Honor, I had "refused" before.

THE COURT: You are sure it was the defendant's request?

MR. GARTNER: Yes, your Honor.

THE COURT: It is refused except as charged, then.

MR. STREAM: And then 24.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 3-1580

THE COURT: What did I say?

MR. STREAM: Refused outright.

THE COURT: Then that's it.

MR. STREAM: Then I take exception to that refusal. Then 31.

THE COURT: Refused.

MR. STREAM: And I take respectful exception to that.

THE COURT: Yes.

MR. STREAM: And that's it, judge.

THE COURT: Very well. How about you, counsellor?

MR. GARTNER: Your Honor, at the risk of offending your Honor, I must say I don't have all of the rulings on these.

THE COURT: All right. We will give it to you a second time. I don't know. This is the first time I had any such trouble but, go ahead, Mr. Reporter, and read my rulings on the defendant's requests.

That's what you want, isn't it?

MR. GARTNER: Yes.

(Record read.)

THE COURT: For the record, 2 is granted as charged. 3, granted as charged.

Now, if I go too fast, you tell me; raise your hand.

MR. GARTNER: No. This is all right.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

THE COURT: 4, refused except as charged.

5 I this is plaintiff's you are talking about?

MR. GARTNER: No. This is def ndant's, your Honor. The first time around you didn't give any rulings on 2 through 8, as the reporter said, so I don't have them.

THE COURT: 2, granted as charged.

3, granted as charged -- that's about circumstantial evidence.

MR. GARTNER: Well, are you going through the plaintiff's? I want the rulings, if your Honor please, on the defendant's requests; not the plaintiff's.

THE COURT: All right. The number of the plaintiff's is what, then, that you want?

MR. GARTNER: The defendant's requests to charge.

THE COURT: Which numbers?

MR. GARTNER: 2 through 8, your Honor.

THE COURT: 2 is granted as charged.

3 is granted as charged.

The general instructions are all granted as charged.

MR. GARTNER: All right. That clears that up. I believe the reporter has the rest.

THE COURT: Will you pick it up?

(Record read.)

THE COURT: Now, Mr. Gartner, please.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

MR. GARTNER: Does your Honor want specific comment on those rulings?

THE COURT: No. I don't want anything that you don't want to give, counsellor. That's up to you.

MR. GARTNER: Well, your Honor, I think that it is necessary to make comment on a number of these rulings.

THE COURT: Well, will you tell me which ones you want to comment about?

MR. GARTNER: On defendant's request number 9 --

THE COURT: That is the one reading "rulings during trial are not to be regarded as indication"--

MR. GARTNER: No, your Honor. I am talking about the defendant's requests.

THE COURT: Well, that's what I have.

MR. GARTNER: I am sorry. I referred to item 9, your Honor; not 8.

THE COURT: Well, what about 8? All this says is "rulings during trial are not to be regarded as an indication of any predilection on the Court's part."

What is wrong with that?

MR. GARTNER: I have no comment on that.

THE COURT: All right. Pass that, then.

MR. GARTNER: On 9, if your Honor please.

THE COURT: This is about filing the complaint and

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

what the complaint means. It is not proof -- that is about all it is.

MR. GARTNER: That's right, but there is a pretrial order in this case which governs the issues, not the complaint.

THE COURT: Well, it may amend the complaint but it doesn't change it otherwise. It doesn't mean that even if it is amended that it is proof, even if you take the pretrial order with the amendments. That is not proof. That merely amends the claim; that's all, so I refuse to change that.

MR. GARTNER: But, your Honor, the request says that the proof must be considered in the light of the claims the plaintiff makes in that complaint. Those claims were amended by the pretrial order.

THE COURT: Yes; in the complaint as amended.

MR. GARTNER: It doesn't say so, your Honor.

THE COURT: Well, that's what it should say. In any event, that's the ruling. Obviously, the complaint is not proof, no matter whether there is an amended complaint or not.

MR. GARTNER: If there is going to be a mention of the complaint, the jury must be informed that there is a pretrial order which amends the complaint.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

THE COURT: I differ from you and I stick to the ruling I made, counsellor. I don't see any other ruling possible.

MR. GARTNER: Now, on request 10.

THE COURT: What is wrong with that?

MR. GARTNER: Again, it refers to specific words in the complaint which have been amended by the pretrial order, your Honor.

MR. STREAM: Your Honor, that is not so. There is no amendment in the pretrial order and this complaint is still before this Court and if counsel wanted to amend it, he had a chance to do it. I have got a right to rely upon this complaint, not upon something which he has outside.

MR. GARTNER: If your Honor please --

THE COURT: Well, the pretrial order under Rule 16 does amend the complaint.

MR. STREAM: To the extent only that the plaintiff demonstrates it. He hasn't demonstrated a single amendment.

THE COURT: He must prove whatever it is. Now, what is wrong with 10, again?

MR. GARTNER: 10, your Honor, specifically quotes from the complaint to say that the issue is that in the words of the plaintiff the defendant was asked to advise and report the true market value thereof, but the pretrial

order says --

THE COURT: What does it say in the pretrial order as to the amendment?

MR. GARTNER: The pretrial order says that it is the plaintiff's contention that as to liability, one, the plaintiff engaged the defendant, which represented itself to be expert in the appraisal, auction and sale of industrial machinery and equipment to make a true and accurate appraisal of the machinery and equipment owned by a manufacturing corporation, Time and --

THE COURT: All right. I shall amend this ruling on Number 10.

MR. GARTNER: Thank you, your Honor.

THE COURT: Please let me have the rest now.

MR. GARTNER: The rest of the quotation?

THE COURT: No. The rest of your exceptions. That is what we are doing, primarily, here.

MR. GARTNER: All right, your Honor.

Items 11 and 12.

THE COURT: What about that?

MR. GARTNER: Both misstate the claim as, again, stated in the pretrial order.

THE COURT: All right. I will amend it if necessary -- No. 11, see PTO."

MR. GAPTNER: Numbers 11 and 12.

THE COURT: All right. The same for those. 13. Anything wrong there? Any exception, I should say. Granted as charged, I believe was my ruling.

MR. GARTNER: No exceptions to 13.

THE COURT: 14? You tell me. I am not going to mention all of them.

MR. GARTNER: Thank you, your Honor.

THE COURT: 14; anything? I hear no exception.

MR. GARTNER: Excuse me, your Honor.

(Pause.)

THE COURT: 14, is it?

MR. GARTNER: Well, I except to that because I don't know what the actual charge of the Court will be. I believe you ruled the request was granted as charged.

THE COURT: Yes. I shall attempt to state the position of the defendant.

MR. GARTNER: I except to 15 because it does not accurately state the issue.

THE COURT: That's the breach of contract count, isn't it?

MR. GARTNER: But it is limited to --

MR. STREAM: I don't know what he is excepting to. The Court refused the item except as charged.

SOUTHERN DISTRICT COURT REPORTERS

jb16

MR. GARTNER: I don't know how it is to be charged.

THE COURT: You will find out in due time. I can't give a complete verbatim statement of what I am going to charge and I am not going to. I am not required to.

MR. GARTNER: I understand that, your Honor.

THE COURT: Well, go ahead, then. Let's get through with this nonsense.

MR. GARTNER: I have to except to it because I don't know what it is.

THE COURT: You told me that. You will find out in due time.

MR. GARTNER: Thank you, your Honor.

No objection to 16, your Honor.

THE COURT: Thank you. Not to 17, 18?

MR. GARTNER: With the reservation that I don't know what the charge is.

THE COURT: Yes. You'll have that.

MR. GARTNER: I am not waiving an objection to what the actual charge will be.

THE COURT: I didn't say you would, counsellor.

MR. GARTNER: 18 is refused; no objection to that.

THE COURT: 19? That's just the evidence. 20?

MR. GARTNER: Reserving any objection to the actual charge. 20 is refused, as I have it; no exception, your Honor.

THE COURT: 21?

MR. GARTNER: 21 is refused; no exception to that.

THE COURT: Yes. 22; that is the negligence claim.

MR. GARTNER: No exception except that it refers to the complaint, rather than the pretrial order which governs the --

THE COURT: Go ahead, then. 23, is it?

MR. GARTNER: 23, refused except as charged. I except to any charge which incorporates any of the statements of that item because the --

THE COURT: What do you mean? I don't understand you. You object to what?

MR. GARTNER: I object to any charge which incorporates any of the statements of item 23 because your ruling, your Honor --

THE COURT: All right. It is refused except as charged. I am not going to tell you what I am going to charge, so go on, please.

MR. GARTNER: I am not asking for that.

THE COURT: I know you are not. Proceed. I see the reason; you have stated it. Please. 24?

MR. GARTNER: The substantive reason, your Honor, is that at the time of payment, the time of payment does not have any effect -- the fact of payment does not have any

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

effect upon what the plaintiff ordered and what it got.

THE COURT: Well, it may have some indication. It may be considered, I think.

MR. STREAM: I still don't see, your Honor, how counsel can take an exception to an item which was refused except as charged and he doesn't know what the Court is going to charge. The proper time, the procedure, calls for counsel to wait until the charge is made.

MR. GARTNER: Please, Mr. Stream. This is my opportunity to state my objections and when I am finished, I am sure the Court will allow you to say whatever you have to say.

THE COURT: Please finish. Let's keep the order.

MR. STREAM: I don't think he is going to finish, your Honor, the way he is going.

MR. GARTNER: No exception to 24, your Honor. I have that as refused.

No exception to 25.

THE COURT: 26. I don't see what is wrong with that. That is a customary --

MR. GARTNER: 27, your Honor, no exception but I must point out to your Honor --

THE COURT: No exception to 26 or 27?

MR. GARTNER: 26 and 27 but I must point out to

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

jbl9

your Honor that 27 says or states the proper rule, that the plaintiff must establish by a preponderance of the credible evidnece, and I most respectfully call your Honor's attention to what will be a contradiction in the special verdict that was prepared yesterday because --

THE COURT: You should have told it to me then.

MR. GARTNER: Your Honor, I am sorry but I did not have very much time to examine it yesterday.

THE COURT: I gave you all the time you wanted, counsellor.

MR. GARTNER: Your Honor, I think the proper rule is as stated, and as your Honor has ruled on item 27, that the preponderance of the credible evidence is to be determinative but the special verdict says the fair preponderance and the word "fair" should be deleted from the special verdict.

THE COURT: I don't think I shall. I decline to do so.

MR. GARTNER: I respectfully except.

THE COURT: Proceed. Let's get on with it.

MR. GARTNER: I respectfully except, your Honor.

THE COURT: All right. You can except all you like.

MR. GARTNER: Now, 28, a very strong exception to that one.

THE COURT: You don't need to say "strong." What

jb20

is the objection there?

MR. GARTNER: Well, an appraisal is not properly defined as simply an opinion. An appraisal is supposed to be a professional result after careful investigation and the proper procedures.

THE COURT: All right. Your exception is noted. Granted as charged is what I said.

Is there anything else? 30 or 31?

MR. GARTNER: Refused except as charged. I simply have to reserve my objection to them.

THE COURT: Well, it has to be dependent upon the question of fact as determined by the jury.

MR. GARTNER: 31, no exception, your Honor.

THE COURT: Thank you. Now I suppose we will have to wait until --

MR. GARTNER: Sorry, your Honor. There are two more supplemental charges here.

32; I except to that, your Honor, because here now the rule is stated to be that the requirement of proof is clear preponderance. There is an absolute confusion as to what the rule is. In one case it is --

THE COURT: Clear preponderance is referable to the punitive damage claim, as I recall it.

MR. GARTNER: No, your Honor, this is referable to

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

the appraisal, the reliance on the appraisal.

THE COURT: 32?

MR. GARTNER: It is also contrary to the evidence. There was no evidence that the appraisal was received after the loan commitment. All the evidence is that the summary appraisal, the telegram was received before the loan commitment.

THE COURT: This is the plaintiff's claim; you say that is not correct? Do you say that the claim said or that the plaintiff's claim is not correctly stated in so far as --

MR. GARTNER: No. I say that the statement that the defendant's claim, that if you find from the facts --

THE COURT: No. 32 I am talking about. What is wrong with the first paragraph, counsellor?

MR. STREAM: That is our claim, your Honor.

THE COURT: It says "plaintiff's claim."

MR. STREAM: That's right.

MR. GARTNER: It is not entirely accurate, your Honor. There were several documents which the plaintiff executed. It was not simply --

THE COURT: No matter how many documents, I think it is a fair statement of the plaintiff's claim, counsellor.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jb22

MR. GARTNER: No, your Honor, it is not and I must except to it.

THE COURT: Well, all right; all right.

MR. GARTNER: The commitment by the plaintiff was not made --

THE COURT: I still rule that it is to be granted as charged. If I find it is necessary to add anything, I will add it.

MR. GARTNER: I just want to point out, your Honor, the commitment that the plaintiff made was made on September 1st; that is when it signed the continuing guarantee.

THE COURT: I don't know about that. This is the agreement; not the guarantee agreement.

MR. GARTNER: Yes, but it was not committed until September 1st, your Honor.

THE COURT: Who was not committed?

MR. GARTNER: The plaintiff was not committed until September 1st.

THE COURT: I can follow that.

MR. STREAM: That is a fact for this jury.

THE COURT: I will stick to what I did before. Anything else? I have gone over these in somewhat of a detail with you.

MR. GARTNER: The second paragraph of 32 is totally objectionable.

THE COURT: I am going to still stick to granted as charged. Go on to 33, please. 33 is refused except as charged.

MR. GARTNER: No exception except to whatever the charge may turn out to be.

THE COURT: Now I have got to take time to reframe the two or three determinations on which I reviewed, although I suppose if it is refused except as charged, I don't know why I need to do it.

Which ones do you have down, Mr. Coyne, that I said I might review? This is the defendant's requests.

MR. COYNE: Number 9 was refused except as charged and he took exception to that.

15 was refused except as charged, which he took exception to.

23 was refused except as charged, which he took exception to and that's it.

MR. GARTNER: 10, 11 and 12, your Honor; your Honor said tnat you were going to redo those.

THE COURT: As to number 12, I will refuse except as charged and then that's it.

All right. I think I have covered it. Now, I

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

think we are now about ready to get the jurors in for the summations.

MR. GARTNER: May I respectfully request, your Honor, an additional half hour on our time?

THE COURT: No. You may not. You can request it. I have ruled and I stick to it. That's all.

MR. GARTNER: I followed your Honor's instructions and I wrote everything down.

THE COURT: Well, I think you will be able to do it in an hour and a half. In any event, that is all you are going to be allowed.

MR. GARTNER: Thank you, your Honor.

THE COURT: I want to have a short recess.

(REcess.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

grimaces, my animations, my movements or his is evidence. The evidence, as the Court pointed out, is what you heard from the witnesses either by depositions or by confrontation and, of course, by the exhibits. And the Court will charge you on that.

To begin with, before we get to the evidence, I ask you a question. I ask you to ask yourselves this question: Who is here? Who is this plaintiff called Ajax something or another? Who are today its officers, stockholders, its officials, its employees; who are they? We found out that Mr. Klein left the company years ago. We find that Mr. Louis left the company years ago. Who is Time & Micro? Do they exist? Who is interested in this case nine years after 1966? Who speaks? Who benefits? What is it that counsel has exercised himself for? What happened to the fuse contract which lies or did lie at the root of this entire transaction, the hope and expectation of the future, the transaction which, of course, Ajax was relying upon when it decided to go and do a deal to clean up the Time & Micro plant facilities so that Uncle Sam would give them a contract? Did they get the contract? Did they do it? I didn't hear anything about it.

I noticed counsel grimacing and smiling, but

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

I am going to start with the complaint, because that is what I had to answer, and let me point this out to you while I am doing this. This complaint was filed -- that means the action was started in the summer of 1969. The transaction was completed, the appraisal, auction sale, by the fall of 1967. What happened between 1967 and 1969 that took so long for the plaintiff to file an action? Was he negotiating with Uncle Sam to see if he could stick him with the lawsuit? You can infer those things because there is no proof to explain it, so your inferences are warranted. Is it possible the plaintiff negotiated with the Government, having lost the contracts, and gotten some kind of settlement? We don't know anything about that. All we know, it took them a couple of years to start the suit, and then it took them six more years to bring it to trial. Complaint filed in 1969; this is 1975. I want to ask the question deservedly: Why did the plaintiff drag its heels?

Now, what is this complaint about, again? Remember what I told you at the beginning of the trial; two things, I said. Remember I said to you that the complaint contains a false, deliberately false statement signed by Mr. Gartner, and I said, remember August 19th --

MR. GARTNER: I beg your pardon, your Honor. I

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

don't want to interrupt counsel's statement, but I think these statements are prejudicial.

THE COURT: I think they are a matter of argument. The jury ought to consider whether the testimony and proof sustains the plaintiff or not. That is all.

MR. STREAM: Thank you. May I continue without interruption, please?

MR. GARTNER: I am not on trial here and he accused me of a deliberate falsehood.

THE COURT: No. This is argument, that is all.

MR. GARTNER: Is that all it is, your Honor?

THE COURT: I think --

MR. GARTNER: I respectfully except and I say this is prejudicial, your Honor, and I ask the Court to instruct counsel to stick to the issues in the case and not make charges against me.

THE COURT: He didn't make any charge against you whatsoever, counsel.

MR. STREAM: The complaint in this action, ladies and gentlemen, was signed by Murray Gartner, a member of the firm representing plaintiff. The first part of it -- I want to back up what I said, and I read to you at the beginning of the trial Paragraph 11, which was the paragraph of this complaint which alleged the defendant's

Why didn't they try to do something? Try to sell it at private sale as Hamilton did? Preserving it intact as a fuse company? Because it was good for fuses. Why did it go at auction sale and why, after letting it go at auction sale, has the plaintiff, Ajax, got the audacity to come in and say, "Yes, we knew all of that but tag, you are it -- that's a great school game. But it doesn't work in the courtroom. Tag, you are it. Because the tag in this case, they didn't try to tag Hirschmann Corporation on their appraisal. They didn't try to tag Time & Micro and they didn't try to tag Haakenson - - you heard counsel say to one of the witnesses, "you know where Mr. Haakenson is now" and the witness' answer was "no," like, see if we know where he was, then we might sue him. Bunk.

They didn't sue anybody. They didn't even sue Time & Micro. They took Time & Micro's note from the bank when they paid off the bank and accepted it, pay to the order of Ajax Hardware Manufacturing and endorsed it over to them.

They also took the subrogation agreement and all the collateral and everything that the bank held and they took over the position of the bank against Time & Micro, and then they sued us.

Tag, you are it.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

Why didn't they sue Time & Micro?

Operation Haste. From the beginning to the end. Operation Haste. Give me a quick appraisal. I don't need it. Somebody else does. Operation Haste. Missed it, what happened to it? 14 months later. Operation Haste, an auction sale. Quick. Public auction. And then it became the case of the uncertain plaintiff.

Now what do we do? Who do we sue?

Let's sue the plaintiffs, let's sue Industrial Plants, that's the most recent appraisal and somehow we will convince that A equals B and one plus one is three.

The suit is brought, I submit to you, on bad grounds. It is brought for the wrong reasons. It is brought without a vestige of right. It is brought with no testimonial value of any kind submitted to this jury to sustain their burden of proof. It is brought in a desperate last minute effort to recoup something which they may never have lost because you don't know and neither do we whether they really lost that $170,000.

They still didn't hsow you the check that they had to pay to the bank but we don't know what they got back from Uncle Sam on the fuse contract.

We don't know whether they recovered the loss

and I submit to you they are under a duty to disclose to this jury what happened in that connection and you have a right to infer that there is something spooky going on or they would have.

Not every loss leads to a recovery. Anybody can sue. A mouse can sue a king but not every loss is recoverable.

How wonderful it would be, the best of all possible worlds, as Candide, Dr. Pangross put it, in the best of all possible worlds, every loss is not recoverable.

It would be wonderful if every person who loses money in the market could sue his broker for having given him bad advice or if every patient could sue his doctor which is what is virtually happening these days.

But the law doesn't permit that. A plaintiff can bring an action when he has a justifiable cause. He must make a case. He can't spatter and splatter generalities and mumble in interruption of my summation. He can do it but it is not meaningful. He must make a case by cogent, competent proof and prove it by the burden which this Court will instruct you is his burden and I submit to you that there is not a scintilla of proof to support his case, and now he will talk to you at great length as is his prerogative, within the time

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

allotted to him by the Court, which probably will be less than he wants, but nonetheless, as it was in my case, but nonetheless, I ask you to remember, as I finish, that I cannot reply.

Please think through, keep your heads screwed on. There are values involved.

This company has been in existence for fifty years, my client. More than dollars and cents are involved here. There is reputation involved here, responsible reputation which grows brick-by-brick over the course of decades, and it may not be destroyed by generalized charges of this type.

I ask you to render a verdict for the defendant on all three counts.

Thank you.

...

THE COURT: For the plaintiff, Mr. Gartner.

MR. GARTNER: Your Honor, may I have a ten-minute recess?

THE COURT: No. I don't think we need any ten-minute recess.

MR. GARTNER: Your Honor ordered me to come to court a half hour earlier today so I could give my papers to Mr. Stream.

THE COURT: Nothing was said before recess until now. We would like to finish before lunch.

MR. GARTNER: I cannot finish before lunch.

THE COURT: I shall request the jurors to remain for a late lunch.

You may go on now.

MR. GARTNER: Your Honor, I would like to have my papers back before I begin.

THE COURT: You may take five minutes for that purpose.

MR. GARTNER: I hope it will not be charged to my time.

THE COURT: Now, Mr. Stream, give him back all the exhibits. And then we will go on.

MR. GARTNER: Perhaps if he can leave them there and I can talk from here, then we won't have to rearrange them.

THE COURT: State how you are arranging them after you have done it, please, Mr. Stream.

MR. STREAM: They are all set so he can see each tag on each exhibit. The ones that he didn't use are left in the plaintiff's folder.

THE COURT: Did you hear what he said, Mr. Gartner?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

now.

MR. GARTNER: Thank you.

THE COURT: The jury may also take a recess.

MR. GARTNER: Thank you very much, your Honor.

THE COURT: Five minutes.

(Recess)

(In open court; jury present)

THE COURT: Now I take it you have your papers ready,Mr. Gartner?

MR. GARTNER: Yes, your Honor.

THE COURT: All right, you may resume.

MR. GARTNER: If I may have the Court's copy of Mr. Klein's deposition handed up to the Court some time ago?

THE COURT: Here it is.

MR. GARTNER: May I proceed, your Honor?

THE COURT: Yes.

MR. GARTNER: Ladies and gentlemen, we were talking about reliance. There is one thing that counsel for the defendant didn't rely on. You heard him say that all of the documents in evidence which he didn't use, which he didn't rely on during his argument, were in this folder. I intend to rely on those documents, because that is what the evidence in this case is, not what Mr. --

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jwmch 78

THE COURT: Those are admitted documents.

MR. GARTNER: Those are all admitted documents, of course, your Honor.

THE COURT: You will get them, members of the jury.

MR. GARTNER. The first document here is this letter which accompanied the appraisal, dated August 19, 1966. And, as I was saying before the recess, in this letter Mr. Thaler said that "As stated in our telegram dated August 17, 1966 the plant is in excellent condition," and so on.

THE COURT: What is that exhibit number?

MR. GARTNER: That is Exhibit 29, your Honor.

And I called Mr. Thaler's attention on his examination to the fact that although he had testified that the telegram was sent on the night of August 15th that he had said here it was sent on the 17th, and he corrected himself and he said, "Yes, that's right, it was sent on the 17th."

Now, Mr. Klein testified, as you will recall, that it was the telegram that was received before the document, which is the loan and security agreement, was signed on the 18th. There is nothing strange and unusual about a telegram which was sent on the 17th being received

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

either on the 17th or on the 18th. It would have been unusual if it had been received on the 19th, which is what Mr. Stream is trying to tell you happened simply by calling your attention to a mail receipt mark which was put on that telegram by Industrial Plants.

And there are many letters in evidence here where you can see the same mail receipt stamp of the Industrial Plants Company. Every time they received a letter, they put this stamp on it, and that is the stamp which was -- take this one at random -- sorry, this is for identification, so it's not in evidence. I won't show it to you.

Take any one. Here's one that is in evidence. Exhibit 15. There is the stamp, March 4, 1969. Compare that with the stamp on the telegram. It's the same stamp. That is what it is. It's a mail receipt stamp. It's not when this telegram was delivered to Ajax.

But reliance goes much beyond that. It's not a question of whether the telegram was received on the 19th, two days after it was sent. We can malign Western Union all we want, but we know that when the telegram is sent you get it sooner than two days after it was sent.

Let's look --

THE COURT: Now wait a minute. That is a statement that -- there is no proof as far as we know about that.

MR. GARTNER: If the Court please, Mr. Stream made a great many statements to the jury as to which there was no proof, and there was no comment made by the Court.

THE COURT: All right. I am simply saying to you and to the jurors that, as far as I know, there was no testimony about when telegrams are received.

MR. GARTNER: There certainly was no interruption by the Court during Mr. Stream's entire --

THE COURT: Go ahead.

MR. GARTNER: There was absolutely no comment by the Court during Mr. Stream's entire statement, and I have a long list of statements that he made here --

THE COURT: You please go ahead with your summation, and don't tell me what you are going to do. Just do it, please.

MR. GARTNER: Let me refer to what is in evidence, ladies and gentlemen. Look at the loan and security agreement. You may take it to the jury

Paragraph 12 of this agreement says, "In the event that Ajax should,without legal excuse, fail to carry out its obligations under this loan and security agreement, or any obligations hereunder incident thereto, Ajax agrees to pay Time the sum of $20,000, which sum is hereby agreed

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

of terrible rush to sell it and that it was a great disaster, and that we didn't offer it to anybody. We didn't own the machinery then.

You have been told that the plaintiff sold the machinery at auction. Plaintiff didn't sell the machinery at auction.

Do you know who sold the machinery at auction? The defendant; Mr. Kriser, sitting there. Didn't you hear him say from the stand that he was the auctioneer? And who was --

THE COURT: That doesn't mean, of course--

MR. GARTNER: Who was he hired by? He was hired by Time & Micro and the First Western Bank. The plaintiff didn't hire him. We didn't decide to sell it at auction. And if this machinery, if this plant if you will, had the kind of value which they have been trying to tell you, and which they told us in 1966 it had, when the defendant was approached with a contract to sell the machinery at auction, why didn't Mr. Kriser, who has told you from the stand that he was prepared to give $350,000 for a plant which he knew was worth $900,000, why didn't he buy it then? Or why didn't he find a buyer for it? Why are they trying to blame us for not finding a buyer for that plant.

He was asked to sell it. The defendant was asked to sell it and they sold it at auction.

If they thought that that machinery and that plant could bring anything more than it brought at auction, don't you think they would have bought it themselves and sold it at $900,000 or $350,000 or whatever it was, whatever they thought they could get for it, other than at the auction sale.

Now they come here and tell you that you should look with suspicion on the plaintiff because we sold it at auction. We didn't sell it at auction, ladies and gentlemen.

This note was in default in January. You remember

what we relied on.

Let me point out another thing, if you will, in this loft appraisal.

You can take this to the jury room with you--

THE COURT: Yes. They can take all of the exhibits and I am going to suggest to counsel that they stipulate that they may take all exhibits in the first place, counsel, so you don't need to repeat that each time.

MR. GARTNER: Thank you, your Honor.

There is a statement of limiting conditions. There is an explicit statement in the letter of December 10, that the total fair market and the total fair market and in-place value of the entire contents of the plant consisting of the machinery and the ventilating system and the blowers and everything-- it is perfectly plain there that that is a plant that they are appraising.

You compare that with the August 19th letter which they sent to us in which they talked about equipment, about used machinery, about many manufacturers who would pay premiums to get that equipment.

Now I say to you ladies and gentlemen that rational people just don't know what they claim Ajax did, that we hire an appraiser and ask him for an appraisal of the in-place fair market value of a plant as a going

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jb:mg 6

concern when the evidence shows that the plant was not going; when the evidence shows and every witness has testified to it-- Mr. Kaefer, Mr. Sinkler-- that the watch industry was on the decline; that there was nobody who would buy a plant of this kind at that time in 1966 and it is not that the tariff came off in January 1967.

Mr. Sinkler testified and if the Court would give me the time I could read it to you,but Mr. Sinkler testified that--

THE COURT: What are you looking for, Counselor?

MR. GARTNER: I'm sorry, your Honor.

Here you are.

And this is on cross-examination. Mr. Stream is questioning him and please, ladies and gentlemen, remember what Mr. Stream said to you in his argument-- he said that Mr. Sinkler-- he said that Mr. Sinkler testified that there was a market for a plant of this kind; that it cold be sold for a fuse manufacturing operation; that after all Mr. Sinkler had sold his plant to the government for a fuse manufacturing company. Remember that's what Mr. Stream told you. He is very fast with words, much faster than I am, and so that a hour and a half for him is like three hours for me, but I have to do the best I can under the directions of the Court.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - [illegible]

jb:mg 7

THE COURT: The jury may disregard that statement. The time is the same.

MR. GARTNER: Well, the time is the same --

THE COURT: All right. Don't argue about that, Counselor.

MR. GARTNER: Thank you, your Honor.

But this is what Mr. Sinkler actually testified to, regardless of what Mr. Stream says.

THE COURT: All right. Let's have it.

MR. GARTNER: Yes.

"When you said to me before in your cross-examination that you meant by overvalue what it would sell for, that is what you said, right?

"A I think I said I know of no one who would pay those prices for that machinery.

"Q Under an auctioneer's hammer, right?

"A I didn't say that.

"Q Is that what you meant?

"A No.

"Q What did you mean?

"A On any terms.

"Q And under an auctioneer's hammer at least, right?

"A That's one way of selling it.

"Q And any other way, right?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - [illegible]

jb:mg 18

value."

And the reason that he asked for replacement value as well as liquidation value is that this report was going to go to the bank and the bank wanted to know what was both-- what was the replacement value and what was the liquidation value.

For Ajax's purposes, we were primarily and basically interested in knowing what the liquidation value was because we were going to put up the money, so that the difference came down to, should we pay a fee, since we thought we had gotten the liquidation value and we knew we had gotten something which was close to replacement value, whatever he called it; should we pay a fee of $4400 or pay a fee of $3250?

And I think you will agree that Ajax made a wise decision when it decided it didn't want to get into litigation over $1200. You have seen what litigation over the amount involved in this case is. They decided to pay the extra $1200 but that is not a concession that we got what we asked for because it was only afterwards that we discovered that we had not gotten what we asked for.

When the time came that the machinery had to be sold because the note was in default, then we found out how the appraisal had been done and you have all heard that.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

jb:mg 19

MR. STREAM: Your Honor, may I be excused for a second and point out that I carefully observed the Court's direction and limited myself to an hour and 12 minutes.

THE COURT: The jury will not consider any argument unless there is proof that those facts existed during the trial or were proved during the trial.

MR. STREAM: My suggestion is that counsel has spoken for an hour and 25 minutes.

MR. GARTNER: No. I disagree with that. By my --

MR. STREAM: I think we are reaching the end of summation.

MR. GARTNER: No. I believe I have spoken for an hour and--

THE COURT: Did you deduct the time for the preparation of the exhibits?

MR. GARTNER: I didn't deduct the half hour that I devoted to Mr. Stream for the preparation of exhibits when I came here a half an hour early.

THE COURT: That is not deductible anyway. Now, don't get on that. That's outrageous.

MR. GARTNER: Deducting my time-- I think by my account, your Honor, I have spoken for an hour and 15

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. -- 791-1020

jb:mg 20

minutes and I believe I have 15 minutes left.

MR. STREAM: I respectfully disagree and I think that counsel ought to be given a limit.

THE COURT: I'll have to decide. You started, Mr. Gartner, at 11:50. I think you may have spent 10 to 15 minutes on reorganization and I'll allow that. That means that you can go on a little further.

MR.GARTNER: Thank you, sir.

But that's the only deduction and one hour and 15 minutes-- one hour and a half will be at 1:20.

I regret that the jury is virtually compelled here by the exigencies of the situation to remain. You will be excused and you will have a good long recess.

Please bear up.

All right. Get on, Counselor.

MR. GARTNER: I want to spend just a minute on the second cause, the second cause of action.

THE COURT: That's negligence.

MR. GARTNER: That's negligence. And I really don't think I have to spend much time on it.

THE COURT: You don't need to spend any time, if you don't think so.

MR. GARTNER: You have all heard how this appraisal was conducted. The machines were not turned on, there

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jb:mg 21

was a claim that they had been told that they could rely on the Hirschmann appraisal and that they could rely upon what Mr. Haakenson told them.

I think that's a very important aspect of this case.

You heard the testimony-- excuse me a minute.

You heard the testimony read that Mr. Kaefer gave and I want to read it to you now because I think it is very important.

"Mr. Kaefer, do you know Mr. Jesse Thaler?

"A Do I know him?

"Q Yes.

"A I met him I guess once or so. Once or twice.

"Q When did you meet him?

"A He came to our place at one time and wanted to get some, I forget what the details were.

"Q When was that, do you recall?

"A About two years ago, a year ago or so, I don't know."

Do you remember I said--

THE COURT: What page?

MR.GARTNER: It is not too important. I only have a limited amount of time and it is difficult for me to proceed if you interrupt me.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

jb:mg 22

THE COURT: All right. Proceed.

I spent maybe one minute of your time, Counselor.

MR. GARTNER: Thank you, sir.

The jury will recall that I pointed out that the deposition was taken in 1970 so that when he said he met Mr. Thaler one or two years before it was either 1969 or 1968.

Now, on page 56 of his deposition, I asked him,

"Q You mean that was the first time you have any recollection of having any conversation with him?

Wher you say that he wanted to get more specifics, I think that was your word, about the 1964 appraisal, exactly what was it that he asked you?

"A That I can't tell you any more. It is my recollection that he said,'I am here to discuss this appraisal you did some time ago for some association.'

"I said, 'Yes, I recall that,' and I was not about to volunteer too much information because, No. 1, I did it in behalf of a client, period.

"Q Mr. Shriro - Precision time?

"A Right, but I didn't pursue the matter further. Whether I have the client's permission to discuss it or anything else, until the subpoena came -- under the subpoena, of course, I am obligated to tell the facts of the

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

case which I am doing but I would not have volunteered to give any information to a third party any time."

Now, ladies and gentlemen, ask yourself this-- if Mr. Thaler is telling you the truth in his deposition, that he was told by Ajax to rely on the Hirschmann report then why, in 1969, 1968, did he search out Mr. Kaefer, who had never heard of him before and try to find out from Mr. Kaefer how Mr. Kaefer had done his appraisal?

What difference would it make to Mr. Thaler how Mr. Kaefer had done his appraisal. He said he was assured absolutely thathe could rely on whatever the Hirschmann Company report said, so why does he go to Mr. Kaefer and ask him, "tell me how you did your appraisal so I can be able to show" -- show what? Why did he want to know?

So that he could show that it was a good appraisal? But he didn't have to do that if he had beetold by Ajax to rely upon it. All he had to do was to put in his report that he had relied upon the Hirschmann appraisal.

But he didn't do that either and if he had done it, what position would Ajax have been in? Ajax would have said, then, "We have been waiting for this appraisal report, we have said that it is a very important thing that we have to do -- what counsel calls Operation Haste, and he

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jb:mg 24

sends this to us now and what does he tell us? He tells us what we already knew-- he copies the Hirschmann report and he repeats to us what Mr. Haakenson, who was then our employee, told him.

If he had put that in his report, we would have known that we weren't getting any information back, that we didn't already know.

So he left it out of his report, pretended, represented to us, that it was his own genuine, professional opinion. And then when there were suggestions that the company was going to be sued by Ajax, he goes to look for Mr. Kaefer to find out how Kaefer did his appraisal so that he could then testify, perhaps, that the Kaefer appraisal had been done in a good way but if we had told him that he could rely upon Kaefer and if he had put that in his report, he had nothing to worry about.

It seems to me, ladies and gentlemen, you have to consider that very carefully-- why did he search out Kaefer and you recall Mr. Kriser on the stand when he was asked where is Mr. Haakenson now, he said, he didn't know.

If it was true that he had been- that Thaler had been told thathe could rely on Haakenson and if it was true that Haakenson had told him what he says he told him, why didn't they find out where Haakenson is?

jb:mg 25

Why didn't they bring him here?

MR. STREAM: Your Honor, that is an objectionable comment and the Court, I suggest, should direct the jury we had no duty to do that.

THE COURT: I will charge the jury as to this.

MR. GARTNER: Don't think we had any comparable duty, your Honor. There was all kinds of suggestions that we didn't bring--

THE COURT: I'll charge the jury as to the failure of either side to produce witnesses.

MR. STREAM: And I suggest that it is 20 minutes after one, too.

THE COURT: Well, five minutes more I think is a fair statement, a fair allowance for the reorganization of the--

MR. GARTNER: There is one more thing I would like you to do in the jury room, if you would indulge me.

Please take Plaintiff's Exhibit 12 and Plaintiff's Exhibit--

THE COURT: I shall ask them to take all, if you will agree, Counselor.

MR. STREAM: I agree, your Honor.

MR. GARTNER: That's not what I am saying, your Honor.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK N.Y. - [illegible]

jb:mg 26

THE COURT: Both sides agree.

MR. GARTNER: Yes, of course.

Please take Plaintiff's Exhibit 5A and Plaintiff's Exhibit 12 or Defendant's Exhibit P and compare them and you will see that these machines are described and listed in exactly the same order, in exactly the same way, and ask yourselves, if you will, what was this great haste that the defendant claims that we put them under to render a professional appraisal.

Mr. Thaler says he did the appraisal in one day. It was over on the night of August 15th. This appraisal was mailed out on August 19th. He took one day to do an appraisal and three days to copy the Hirschmann report. It is very neat typing. But even that, it seems to me, should not have taken three days and if heeded more time, the three days should have been spent in appraising and not in typing.

I have one other thing to say, ladies and gentlemen. I think we have proved-- it is up to you to decide--- I think we have proved that we asked for an appraisal which called for a replacement value and for liquidation value; that we thought we had gotten it, that we relied upon it, and that we were damaged to the extent of all the moneys that we had to pay when we had to make

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - [illegible]

jb:mg 27

good on the loan.

I think we have proved that even if the defendant's claim is correct, that for some unbelievable reason, for some unimaginable, irrational reason, we concealed from them the true purpose of the appraisal that we wanted and we told them that we wanted going, in place value for a plant that was not going and was not operating and didn't tell them we wanted a loan and that we asked for the going plant value. We didn't get it because no appraisal was done-- not a single question was asked by Mr. Thaler of anybody as to whether this plant had a market and the testimony is undenied that there was no market for such a plant.

So, they have breached the contract there and they have breached it further by not professionally dong the job that they were supposed to do, making inquiry into market conditions, making inquiry into possible buyers, making inquiry as to what the machinery would bring--

THE COURT: I don't like to interrupt you but your time is just about ended.

One minute more.

MR. GARTNER: I have just one more sentence.

THE COURT: All right. One more sentence.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

MR. GARTNER: In view of all the things that they did not do -- the negligence was so gross and the representation that it was their professional appraisal, when infact it was a copy of somebody else's who was not an appraiser, we submit that punitive damages of $50,000 should be awarded.

THE COURT: Now, let me just state there that the jury will have to determine that and this is merely an opinion of counsel.

The summations are now closed.

MR. GARTNER: Thank you, your Honor. And thank you, ladies and gentlemen.

THE COURT: Jurors, it is now nearly half past one. Come back at three o'clock. I may keep you a little longer this afternoon but I think it is wise to give you a good recess now.

(Luncheon recess)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

jb:mg 29

AFTERNOON SESSION

(In the robing room)

THE COURT: Now, what is this about, Counselor?

MR. GARTNER: Your Honor, I want to make objection to a number of statements that counsel made during his opening statement.

THE COURT: There is no necessity for that.

MR. GARTNER: I mean the closing, the summation. I think, your Honor, there is a necessity for it.

I was counting on the Court to keep counsel properly within bounds.

THE COURT: Well, I think I did, in accordance with usual procedure.

Now every word that is uttered is susceptible to some deviation in argument.

What is it you want to take exception to?

MR. GARTNER: If your Honor please, counsel suggested to the jury that we owed some explanation as to whether we got a settlement from the government and this is not an issue in the case - there was not an iota of evidence on it, and I expected your Honor to do something on it and your Honor did absolutely nothing.

MR. STREAM: That's fair comment, your Honor.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

THE COURT: I shall make a statement in the charge that it is irrelevant.

MR. GARTNER: It is also irrelevant to suggest to the jury that somehow the plaintiff is responsible for bringing Mr. Louis and Mr. Klein here when neither of them are officers or connected with the company.

THE COURT: I don't understand what you are talking about.

MR. GARTNER: Counsel suggested that there was something wrong with our case because we didn't bring Louis and Klein here.

THE COURT: I shall also charge on that, Counselor, so you don't need to worry.

MR. GARTNER: I didn't want to interrupt counsel during this summation, although he didn't object to doing that to me, nor did your Honor object to interrupting me during my summation.

THE COURT: I have stated that I will rule on both of the statements in my charge.

MR. GARTNER: I also want to put on the record that I very, very basically object to your Honor's limitation of my time in the way in which you did it.

THE COURT: All right. You have it. That's all over with and I think that an hour and a half was

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

jb:mg 31

exceedingly reasonable.

MR. GARTNER: If your Honor please, in this case and under the circumstances, I don't think it was.

THE COURT: All right.

It is my opinion that has to control. That's all I am going to say about that.

MR. GARTNER: There was no recess between summations and I think that that--

THE COURT: There is no custom to have recess between different summations.

MR. GARTNER: Your Honor ordered me to come into court a half hour ahead of time to bring the documents to Mr. Stream.

THE COURT: I asked him to come, too. I am not saying anything more, Counselor.

I have decided that.

MR. GARTNER: Thank you, your Honor.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jb-6

or omission to act by an agent or employee of the corporation, if it is done within the scope of his employment, is held in law to be an act of the corporation he represents and the corporation is bound by his acts.

Now, the plaintiff's contentions in substance are as follows:

The plaintiff contends that it engaged defendant, which represented itself to be an expert in the appraisal of industrial machinery and equipment, to make a true and accurate appraisal of the machinery and equipment located at the Time and Micro plant in Strasburg, Pennsylvania.

Plaintiff contends that it told defendant it was considering entering into a loan agreement if this machinery and equipment would be adequate security for said loan.

Plaintiff further contends that on August 12, 1966 it informed defendant that it wanted to know specifically whether this machinery would realize at least $270,000 at a forced sale to provide adequate security for the proposed loan.

Plaintiff also contends that it told defendant to make an independent appraisal as to the value of each item of machinery and equipment and that it needed the appraisal very soon but that it would await the appraisal before entering into the loan agreement.

jb7

Plaintiff contends that the defendant inspected the machinery and equipment on August 15, 1966 and that the defendant called by telephone as to the amount of the appraisal and also sent a telegram, Plaintiff's Exhibit 3, giving the preliminary appraisal figure on August 17, 1966. On August 18, 1966, plaintiff entered into a loan and security agreement -- this is the contention -- with Time and Micro, Exhibit 9, and that on August 19th, plaintiff received defendant's formal detailed appraisal report in writing.

Plaintiff further states that pursuant to the loan and security agreement entered into with Time and Micro on August 18, 1966, plaintiff entered into an agreement guaranteeing a loan to Time and Micro, I believe on September 1 1966.

Time and Micro thereafter defaulted on the loan and the plaintiff was therefore obligated, it alleges, to pay the remainder due after an auction sale of the machinery and equipment, which was the collateral for the loan.

Plaintiff contends that the amount realized from the sale of the machinery and equipment was less than one-third of the amount the defendant represented as the lowest conceivable amount the machinery and equipment could bring if sold within two years after the appraisal.

Consequently, plaintiff therefore contends that

jb8

the defendant breached its contract entered into with the parties on or about August 12, 1966, in that defendant failed to make an accurate and appropriate appraisal; second, that the defendant was negligent in making its appraisal of the machinery and equipment at the Time and Micro plant; third, that defendant committed fraud against plaintiff in making misrepresentations to plaintiff in its appraisal report and likewise contends that it was caused to sustain pecuniary loss as a result of the said alleged breach of contract, negligence and fraud.

Now the defendant's contentions:

The defendant contends that plaintiff engaged it to make a fair market value appraisal of the Time and Micro plant as an entire plant, intact and ready for operation and denies that plaintiff requested it to appraise what value each item of machinery would realize at a forced sale.

Defendant contends that plaintiff gave it a two year old appraisal, the Hirshmann appraisal, and arranged to have a Mr. Haakenson, who was familiar with the plant, accompany and aid defendant in making its appraisal.

Defendant contends that the plaintiff told it to rely on the facts contained in the earlier appraisal and those facts related to it by Mr. Haakenson in order to update the original appraisal. Defendant contends that

this was done in order to save time in that plaintiff wanted the appraisal as soon as possible.

The defendant also contends that the plaintiff did not ask for the forced sale value of the machinery and equipment until a later date. Defendant also contends that it offered plaintiff its own standby guarantee for a period of time to purchase the entire plant, machinery and equipment for $350,000 and that plaintiff did not accept it.

Defendant further contends that it provided the type of appraisal which plaintiff requested; that it did not breach its contract; that it was not negligent in making the appraisal and did not under any circumstances commit fraud against plaintiff; and, that plaintiff is in no event entitled to punitive damages.

Now, counsel for both parties stipulated to the following facts:

One, that at all times relevant to this action, defendant held itself out to plaintiff and the public as a firm which was in the business of and expert in the appraisal and auction sale of industrial machinery and equipment and related mechanisms -- perhaps "merchandise" is a better word;

Second, that on or about August 17, 1966, defendant telegramed to plaintiff its preliminary appraisal report, Exhibit 3;

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Third, that on or about August 19th, defendant mailed to plaintiff a detailed appraisal report, Plaintiff's Exhibit 5;

Fourth, that on or about November 30, 1966, the plaintiff paid to the defendant the sum of $1,422.71 in complete payment of defendant's appraisal fee;

Fifth, that on or about August 25, 1967, Time and Micro and the First National Bank and Trust Company -- hereinafter referred to as "Bank" -- employed defendant to conduct an auction sale of the various pieces of machinery and equipment at the Time and Micro plant, which auction sale defendant conducted on October 10, 1967. However, this was an independent relationship in so far as the appraisal matter was concerned;

Sixth, defendant publicised and advertised the auction sale prior to the date thereof;

Seventh, the proceeds of the said auction sale for the items sold amounted to $144,278 -- Exhibit 26.

Plaintiff, as I said before, has asserted three causes of action: First, breach of contract; second, negligence; third, fraud.

The plaintiff does not have to prove all of the abovementioned claims in order to recover damages it may have sustained. If the plaintiff proves any one of these

jbll

three claims, the defendant is liable for resulting damages, if any, proximately caused thereby. I speak of compensatory damages.

In the first cause of action, the plaintiff seeks to recover damages for defendant's claimed breach of contract. In order for the plaintiff to recover on this cause of action under this theory of breach of contract, it is obvious that it must prove by a fair preponderance of the credible evidence, first, the formation of an oral contract between plaintiff and defendant, including the terms of such contract; second, the plaintiff must prove with the same degree of proof that defendant failed to perform its obligations under the terms of that contract as determined by you; third, that the plaintiff was damaged thereby.

Now, what is a contract? A contract is simply an agreement, ordinarily between two parties, to do or not to do certain things. In this case, the alleged agreement concerns the obligation of defendant to provide the plaintiff with an appraisal of certain equipment and machinery located in the plant of Time and Micro. The terms of the alleged agreement are a basic issue. That is the first thing, members of the jury, that you must determine.

Now, the plaintiff must prove by a fair

preponderance of the credible evidence the terms of the contract, that said terms were not complied with and that it has been damaged.

It is for you to determine from the evidence you have heard what the terms of this agreement were between plaintiff and defendant.

If you find that defendant did not fully comply with the terms of this agreement as you determine them to be, then the defendant has breached the contract. If you find that the defendant did fully comply with the terms of the agreement as you determine them, then the defendant has not breached the agreement.

Now, in connection with oral contracts, all relevant evidence concerning the statements of the parties made on or about the time of the contract must be considered in determining the terms and the terms include the instructions with respect to the use by the defendant of the Hirshmann appraisal of 1964. Any subsequent statements made orally or in writing are not determinative of the terms of the contract entered into on or about August 12, 1966.

An appraiser, by virtue of his position and his holding out and his contract, must exercise the care and competence reasonably -- reasonably, I repeat -- expected of persons in that profession. He must adhere to accepted

jbl3

professional standards in general in carrying out his duties under the contract. If he fails to perform in accordance therewith, he then may be liable either for breach of his contract or for failure to exercise due care which, in itself, may be negligence. He must perform the thing agreed to be done with care, skill and faithfulness and a wilful or negligent failure to do so is a breach of contract.

The sections of the Code of Practice and Ethics for Appraisers which were read to you -- I believe the testimony about these came from Mr. Sinclair, did it not -- are not binding on you but you should consider them in determining whether or not professional standards were used in making the appraisal.

There may be, as I think Mr. Sinclair stated, a suitable appraisal, even though it does not comply with all of these specified professional standards and, as I have indicated, the failure to comply with these professional standards in the actual form of appraisal does not necessarily mean that the values described therein are wrong.

The fact that the plaintiff paid the defendant's fee does not necessarily constitute a waiver of any claims which may arise from defects in the performance of this contract, according to the original terms thereof.

As to the second cause of action, the plaintiff

jb14

claims that the defendant is liable to it for negligent appraisal of the subject matter of the alleged contract entered into on or about this August 12th date. In order for the plaintiff to recover on this theory of negligence, the plaintiff must establish by a fair preponderance of the credible evidence, first, that the appraisal was negligently made and, second, that said negligence was in fact the proximate cause of a financial loss to the plaintiff.

What is negligence? In general, negligence is the doing of some act which a reasonably prudent person would not do under all of the circumstances of a given case or the failure to use ordinary and reasonable care under a given set of circumstances by doing what a reasonably prudent person would not do.

Ordinary care, ladies and gentlemen, is that which reasonably prudent persons would exercise in the management of their own affairs in order to avoid injury to themselves or to their property or to the person or property of others.

As I briefly mentioned heretofore, the defendant, as an expert in the field of appraisal and auction sale of industrial machinery and equipment was under a duty to take reasonable care and reasonable competence in supplying the appraisal requested by the plaintiff on or about August 12, 1966.

The services of experts are sought becuase of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession and to adhere to accepted professional standards. A failure to discharge that duty will subject to them to liability for negligence.

Those that hire such persons are not justified in expecting infallibility, but they may expect reasonable care comparable to that of others in the profession. Failure to exercise such reasonable care, if in fact there was a failure, constitutes negligence.

The degree of care, however, must be measurable under the instructions which the plaintiff may have given with regard to the use of the appraisal of '64 and also with any other request which the plaintiff made in connection with this arrangement.

What is proximate cause? This doctrine of proximate cause is, in substance, the same whether it is breach of contract or whether it is negligence, or whether it is fraud. There must be a showing that the acts complained of caused the loss, whatever it may have been, to the plaintiff. I charge you that proximate cause is that cause which, in natural and continuous sequence, unbroken by any intervening cause, results on the consequent damage. An act

or omission is a proximate cause of an event if it is a substantial factor in bringing about the event or loss. Furthermore, if the plaintiff did not rely upon the defendant's appraisal in guaranteeing the loan made to Time and Micro, then the defendant's acts should not be the proximate cause of plaintiff's financial loss.

In the third cause of action, plaintiff seeks to recover damages it claims it sustained as a result of a misrepresentation made to it by defendant. One who represents as true that which is false with intent to deceive the party to whom the representation is made is liable to that party if it believe the representation as true and suffers damages as a result of its justifiable reliance upon it, if he did rely on it.

In order for the plaintiff to recover in this action on the theory of fraud, it must establish by clear and convincing evidence as follows:

First, that the defendant made a representation of fact to it; second, that such representation was false and was known to be false by the defendant or was made by the defendant recklessly without knowledge as to its truth or falsity or without any reasonable basis to believe its truth; and three, that the defendant intended to deceive the plaintiff; four, that plaintiff believed and justifiably relied upon the representation and was induced by it to guarantee a loan

made to Time and Micro; five, that as a result of this reliance upon the representation of defendant, plaintiff sustained pecuniary loss.

IN order for there to be fraud, there must be a false statement or a representation. Fraud cannot be founded upon erroneous representations made in good faith and not recklessly. Therefore, if you find that a misrepresentation was made by the defendant, the defendant's vice president, but that it was made through honest error and with a bona fide belief that it was true, you must find that there was no fraud on the part of the defendant.

A false statement is made with intent to deceive if it is made with knowledge that it is false. Moreover, even though you do not find that the defendant knew its statement to be false, you may infer that the defendant intended to deceive provided you find that the statement was false, and that defendant made it recklessly with the pretence of knowledge that it was true when in fact he knew that he had no such knowledge.

I emphasize, however, that in such a case, it is not enough that the statement was negligently made. In making your determination, you should consider any instructions made by the defendant to the plaintiff with respect to the appraisal. Whether the party to whom a representation is

jbmb-4-13

made is justified in relying on it generally depends upon whether the fact represented to him is one that a reasonable man would consider important in reaching a decision in the transaction in question.

Reliance may be justified if the party making the representation knows that the party to whom it is made considers it important and will rely upon it.

Plaintiff must also prove by clear and convincing evidence that it has suffered pecuniary damages in reliance thereon.

I speak of damages. The mere fact that I speak of damages, ladies and gentlemen, does not indicate whether or not damages should be awarded. You must determine this question of liability first. If you find that there is no liability, then there is no reason or basis for the consideration of damages.

All of the instructions which I have previously given you on the issues of burden of proof, fair preponderance of evidence, and so forth, apply with equal force to proof of damages. In this part of the case, plaintiff must, in the first instance, prove his damages resulting from any breach of contract or negligence by a fair

preponderance of the credible evidence, and it must establish the nature, the extent, and the effect of such damages. The defendant must respond to all damages flowing from and the natural consequences of the breach of duty to the plaintiff as measured by common experience in the usual course of events.

But these damages, these compensatory damages, may not be speculative or conjectural. Your verdict must be based upon the facts of the case, determined without bias or sympathy either way and based upon the basic principles of burden of proof which I have outlined to you.

This plaintiff in this case is asking both compensatory damages and punitive damages. Compensatory damages are given in satisfaction or recompense for a loss or injury. Punitive damages are awarded beyond the actual damages sustained as punishment for the defendant's conduct.

If you find that the defendant -- and these are the requirements in general for punitive damages of any kind -- if you find that the defendant breached its contract with the plaintiff, the plaintiff should be awarded compensatory damages that are natural and probable consequences of the breach or, in the ordinary course of events, would likely result from that breach and which would reasonably have been foreseen or contemplated by the parties. If you find

further that the defendant was negligent in the performance of his services as an appraiser, or committed fraud, the plaintiff should be awarded those damages that would result directly from and as a natural consequence of such negligence. Those are the compensatory damages.

If you should find that the plaintiff is entitled to compensatory damages, your award cannot exceed the total sum claimed for such damages, which is $161,895.75.

In addition to the actual damages, the law permits the jury, if certain circumstances are proved and only then, to award the injured party punitive damages as they are called, in order to punish the wrongdoer for some extraordinary misconduct and to stop him for such conduct in the future.

If the jury should find from a fair preponderance of the credible evidence in the case that the plaintiff is entitled to a verdict for actual compensatory damage and should further find that the act or omission of the defendant which proximately caused the injury or damage was wantonly or recklessly done, then you may, in the exercise of discretion by unanimous vote, of course, add to the actual damages such amount as the jury shall unanimously agree to be proper as punitive and actual damages.

However, a mere breach of contract, I charge you, does not warrant punitive damage.

An act or failure to act is wantonly or recklessly done if done in reckless or callous disregard or indifference to the rights of the injured person or party. Whether or not to make any award for punitive damages in addition to the actual damages is a matter exclusively within the province of the jury.

If you should subsequently find unanimously, of course, and subsequently, from a preponderance of the evidence in the case that the defendant's act or omission which proximately caused actual damages to the plaintiff was wantonly and recklessly done -- or recklessly done -- but you should always bear in mind that such extraordinary damages may be allowed only if you should first unanimously award the plaintiff a verdict for actual or compensatory damages, and the jury should also bear in mind not only the conditions under which and the purposes for which the law permits an award of punitive damages to be made, but also the requirement under the law that the amount of such extraordinary damages when awarded must be fixed with calm discretion and sound reason, and they must never be either awarded or fixed in amount because of any sympathy, bias, or prejudice with respect to any party in the case.

So much for my attempted explanation of the law. Now to the facts, which I shall attempt to recite to some

SOUTHERN DIST. OF COURT REPORTERS

jbmb8-21a

degree. Please bear in mind that this is only my recollection. What I may say or what counsel may have said is not to be taken in place of your own recollection of the facts or evidence. It is your duty to consider all of the testimony given by all of the witnesses, and the fact that I advert to certain testimony and may not refer to other testimony does not mean that any testimony or proof whatsoever should be disregarded.

There are numerous exhibits and I will speak of these generally later, and the plaintiff's exhibits, which are some 29 in number, which will be supplied to you as well as the defendant's. The attorneys have stipulated that you may, Mr. Foreman, when going out to deliberate, take all of the exhibits. I shall simply let the clerk recite to the reporter the numbers of the exhibits of plaintiff and defendant, and you will utilize these as may be required.

As to the testimony of Arthur Sinkler on behalf of the plaintiff, it in substance was as follows: He worked for the Hamilton Watch Company since 1936, and was made president in 1954. He retired from that position in 1971. As president of the Hamilton Watch Company, he had to approve the purchases of machinery and equipment. He testified that since 1964, the watch industry expected that tariffs would be lowered, and once the tariffs were lowered, the United

States makers of high precision watches would not be able to compete with foreign competitors.

He stated that in 1966 the industry had concluded that tariffs were definitely going to be reduced. This was his opinion. He a so gave as his opinion that the appraisal of the equipment -- based upon the equipment not being available to American manufacturers unless they were members of the trust was not true in fact.

I believe he said that a consent decree dated February 8, 1965, Plaintiff's Exhibit 6, had removed American restrictions on the sale of certain Swiss watchmaking machinery so that it could then be sold to anyone who wanted to buy it.

He also testified that in his opinion, there was no market in the United States in 1966 for the type of machinery at the Time and Micro plant, and that the defendant's statements that manufacturers would pay premiums over and above the values established in our appraisal,as they called it, if this were made available to them, was not true in his opinion.

He also included in his opinion that the defendant's statement that there was not one existing plant in this country so equipped as Time and Micro was false.

Then the next witness was George D. Sinclair, who you will recall. He is president of Keystone Appraisal Company which appraises industrial and commercial properties, both

jbmb10-22a

real estate and machinery, senior member of the American Society of Appraisers and their international president. He said it was an organization of professional appraisers. He said, by way of his education, that he attended Drexel Institute, received a degree therefrom. He instructed a certain equipment appraisal course, that he had been an appraiser for 23 years and specializes in the value of machinery and equipment.

YOu will recall that he read certain sections from the code of practice and ethics for appraisers which was in existence at the time of the alleged contract. This code, however, is merely a set of guidelines promulgated by the American Society of Appraisers and hsould be considered by you only in that context.

He further testified in his opinion as to how an appraisal should be done, what should be taken into consideration, and what should be included in the report. An appraiser should consider, he said, the marketability of the item and if he uses any other information, reports, or opinions of other persons in determining the value he attaches to the equipment, that that should be stated.

He also distinguished between on-site and off-site valuations and what fair market value was. He said that generally speaking an appraiser should test the operation of

jb23

the machines.

In cross examination, Mr. Sinclair testified in substance as follows:

He said that he had never appraised high precision watch making equipment before and had no opinion as to the accuracy or inaccuracy of the appraisal figures given in defendant's appraisal.

Howard Klein testified through written interrogatories which were read in substance as follows:

He was executive vice president of plaintiff corporation; he first met Jesse Thaler of defendant's corporation in New York on August 12, 1966, and at that meeting he said he told Thaler that plaintiff was considering assisting Time and Micro in repayment of the loan which was outstanding against it in excess of $250,000.

He told Thaler that the plaintiff had no knowledge of the value of the machinery in Time and Micro plant and that they would depend solely on the value established by Thaler's appraisal in making a decision to guarantee the loan. He said that he told Thaler he wanted an itemized appraisal of each piece of equipment and not an appraisal of the entire unit as a watch making plant.

He said he told Thaler that he wanted to know if on a forced sale there would be enough value to assure

jb24

plaintiff's guarantee of approximately $250,000 on this mortgage debt of Time and Micro.

He further stated to Thaler that he wanted the appraisal done right away. He declared that Thaler was given the Hirshmann report of 1964 and told to use it as an inventory guide but to make his own independent appraisal as to the present value of such items of machinery. He arranged, however, for Harry Haakenson, an employee of Hirshmann, I believe, to meet there and to take him to the Time and Micro plant. Haakenson was familiar with the particular plant and could be helpful, he told Thaler, in identifying each item in the inventory to be appraised.

Klein said that he told Thaler not to rely on any other information which he might get from Haakenson. Klein said that Thaler told him that the fair market value of the machinery and equipment was approximately $900,000 and the forced liquidation value was about $500,000. He told Thaler that the plaintiff was waiting to get the appraisal in writing before consummating the agreement with Time and Micro.

Klein also stated that the agreement with Time and Micro was executed and delivered only after plaintiff received the telegram from the defendant. He said that plaintiff relied exclusively on the defendant's appraisal

in making the agreement. Klein also said that after the auction sale in October of 1967, he met Thaler and remarked then that Thaler said something about having made a mistake in the appraisal.

Klein said that Thaler said he did not have sufficient time to check the values because the plaintiff had asked for the report 2 or 3 days after the inspection.

With respect to the defendant's standby guarantee of $350,000 for the appraised machinery and equipment for 120 days, Klein said he understood this to be an offer that guaranteed $350,000 would be realized. This was not accepted, so I don't know that that is material.

Now, the testimony of Thaler was taken at another deposition. This was on December 10, 1969, and portions of it were read, first by the plaintiff's counsel. Thaler was then the vice president of the defendant corporation for a period of a number of years -- I believe now there is no evidence that he has continued as president or vice president.

He stated that, in the deposition, he had been in the machine tool industrial equipment field specializing in the appraisal of such equipment for over 25 years. He is a senior member of Black-Sinclair; senior member of the American Society of Appraisers. He testified that he met Klein on August 12, 1966, in New York, the first time. He

jb26

stated that Klein gave him the Hirshmann report at this meeting and asked him to give him an appraisal as to his judgment of what this equipment was worth. He said that one of the reasons Klein gave him the Hirshmann report was so that he could have a list of the equipment which he was to appraise. There is, of course, a marked difference in the testimony of Thaler. Thaler testified that Klein told him he wanted this appraisal in connection with some financing which would involve the machinery as collateral.

The appraisal was made by Mr. Thaler I believe on August 15, 1966. In making the appraisal, Thaler said he used the Hirshmann report and a pad and pencil and so forth to record his notes with regard to each machine. He stated that he viewed the machines to determine the condition of each, referred to the original cost of each machine in addition to its approximate age, which would then be the basis of determining the present value as against the value made by Hirshmann.

He said that he did not operate the machines when appraising them. He said that he did not consult anyone or refer to any other sources of information when making his appraisal.

Thaler said that Haakenson advised him of the difficulties in obtaining this type of equipment from

jb27

Switzerland because there was some syndicate which controlled the importation of the equipment to the United States and that delivery schedules were between 2 and 3 years from date of order. But he said he did not know this of his own knowledge. He stated that machinery in general was very difficult to come by, especially new machinery.

In his statement, he said that manufacturers in this country would pay important premiums over and above the values established in his appraisal, and the statement was based on the fact that this was a complete unit for the manufacture of precision instruments. In other words, he contends that he made it on the basis of the inside valuation.

He further testified that he knew plaintiff wanted a quick appraisal and that it was waiting for this appraisal in connection with some dealings which it had with Time and Micro. He also testified that the 15 percent which was added to the fair market value to arrive at the figure as stated was in place and that it represented transportation costs and installation costs.

Although Thaler stated that he had never appraised more than 25 or 35 machines of this type, he was familiar with this type of equipment.

Now, certain testimony of Mr. Thaler not read by plaintiff was read by the defense counsel. There Thaler

stated that Mr. Klein asked for the audit for value of the plant in place and ready for operation. He said that plaintiff was negotiating a contract with the Government for the production of fuses, and that they wanted to know the value of the plant as an operating business. He said that he thought they were going to borrow money on the strength of the dollar value that was placed on the plant. He was told by Klein, apparently, that Mr. Haakenson would be the man in charge of the production of the fuses and was very familiar and knowledgeable with the workings of the plant together with the machine tools and equipment.

He said that Klein gave him the Hirshmann report and said that it was a list of equipment, and on it was the appraisal which was made by the Hirshmann company.

Thaler in this deposition said that Klein told him that they were importers of this equipment and that they were qualified to establish a value of this equipment. He said that Klein said he wanted the Hirshmann appraisal upgraded and that he could rely completely on the appraisal of HIrshmann in order to save time and establish the value for his appraisal. By upgrade he said he meant that he was to value the equipment as of the date of his appraisal.

He also testified that Klein told him that Mr. Hakkenson would accompany him, that he could rely on

Haakenson because he was very familiar with this equipment and that this would save time since plaintiff needed this information at an early date.

He said that at a later date, Klein did ask him what the equipment would be worth at a public auction.

Now the defense: The defense called as its only witness Sidney Kriser who is now president of Industrial Plants and so forth, and who in 1964 was secretary-treasurer and vice president. His duty at that time in general was operating head of the corporation, mainly involved in financial matters.. Kriser stated that he had been familiar with the Hirshamnn Corporation for at least fifteen years; that the Hirshmann Corporation had the reputation as the largest importer of high precision Swiss and German machinery, and was the agency for importing Swiss machinery for watchmaking in the period 1964 to 1966.

He said that Klein of plaintiff's corporation contacted him by telephone on or about the end of August 1966, as to whether the defendant would state a price which it would pay plaintiff for the appraised property, and if the defendant would be willing to back the appraisal by providing a standby guaranty and for what value.

Kriser then prepared and sent a written offer of a standby guaranty, Defendant's Exhibit K, stating that, "We

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

are prepared to give 120 days standby guaranty of $350,000 at a fee of five percent."

Kriser also stated that he received no response from Ajax to this offer of a guaranty.

On cross examination, Kriser was asked, what kind of value did the $350,000 represent. He responded that the $350,000 value took account of the in-place value of the machinery, but did not include the real estate.

Plaintiff, as a part of the rebuttal testimony, read portions of the deposition of somebody named Martin H. Kaefer of the Hirshmann Company. This amounted to an answer thathis company were not professional appraisers, but that he had done some appraising before, and that the 1964 appraisal of Time and Micro was his first big job.

The defendant here, as I have already attempted to outline to you, contends of course that the contract was entirely different from that which the plaintiff claims, and you will first have to decide, as I have already instructed you, what was the contract, what were its terms, and as I said before, this must be established by the plaintiff by a fair preponderance of the credible evidence.

There is also a defense here raised by the defendant as follows: Plaintiff contends on the one hand that August 1966 is the date on the telegram, Exhibit 3, which is here, and I will put it with the other exhibits.

There is a stamp and apparently this is the basis of some controversy. There is a stamp reading August 19, 1965 up near the upper right-hand corner of Exhibit 3. Defendant contends that the date August 1966 on the telegram is the date when plaintiff received the telegram, and hence, that the plaintiff did not enter into the guaranty agreement or the appraisal, rather, before acting on the contract with the bank and Micro.

Plaintiff contends that at the time of the delay, the delivery of the Western Union telegram was not as long as two days for the delivery. However, I have to state that there is no proof in the record as to what time it takes for telegrams from a given place to get to another place, to arrive.

In the deposition of Klein, he states that the security and loan agreement was signed after he received the telegram.

I don't know how you can determine what the date August 19, stamped on Exhibit 3, means. It may be that you can do something by some circumstantial evidence, but I don't know exactly how you can do it.

The fact that the plaintiff may or may not have gotten some sort of settlement from the Government with regard to any fuse contract is not an issue in this case,

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

and it is immaterial.

There has also been some contention by one of the parties here that there wer persons who should have been called by the other counsel, but who were not called. Generally, the following principles take place: in the first instance, unless the missing witness witness, if I may call him such, has some material relevant testimony to give, there is no necessity of that. In the second place, when each party has equal access to the powers of subpoena and there is no employment relationship, then no significance can be ascribed to this alleged failure to call.

So much for my resume of the testimony. Remember that it is your recollection which must prevail. If I have mentioned certain things and I have omitted to mention others, there was no intent whatever on my part to emphasize or minimize. It is your duty to consider all of the testimony given by all of the witnesses. If perchance I have made any reference to the testimony in this case which does not coincide with your own recollection, you are to have no hesitancy in disregarding such reference by me and, of course, relying upon your own recollection which, as I stated, may be refreshed by readings from the record of the proof.

No statement by me made in this charge is intended to influence your judgment.

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

to consider the evidence, to listen to the arguments and reasoning of your fellow jurors, to present your own individual points of view and to reach an agreement solely and only on the evidence but without violence to your own judgment. YOu are not to yield,for example, simply because you may be outnumbered.You should vote with the others only if you ar convinced on the evidence and the law as I have charged it to you that it is the correct way to decide the case.

On the other hand, you should not hesitate, if you are convinced by a fellow juror,to change your point of view, if it appears to have been erroneous to you.

To return a verdict in this case, it must be unanimous. I have prepared and I will ask the clerk to give to the foreman the original and, Mr. Foreman, this is the only copy that need be signed by the jurors. I think that these questions are clear. If they are not, you may send a note in.

Let me say this fundamental thing with respect to the answering of these questions. You must, in every instance, with respect to every question, consider it pursuant to the instructions which I have this day given you, and then, after six of you agree, you may sign the third sheet on the original, Mr. Foreman, which has the spaces for the signatures.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

The lawyers have presented this, and the witnesses have participated. The proof consists of testimony and of exhibits and readings from depositions. You job is to render a verdict in accordance with this special verdict.

If you have any question about the special verdicts, write a note, let the foreman sign it, and send it in through the deputy marshal to the clerk, and I shall attend to it.

Are there any exceptions, Mr. Gartner?

MR. STREAM: None, your HOnor. I accept the charge as given.

THE COURT: How about you, sir?

MR. GARTNER: I have no exceptions, your Honor.

THE COURT: All right.

You may now retire, and by stipulation, as I stated, all exhibits may be taken with you, and I will ask the clerk to read upon the record first the numbers, merely the numbers of the plaintiff's exhibits so that we can know what has been sent in to you.

THE CLERK: Shall I read them now, your Honor?

THE COURT: Yes.

THE CLERK: Plaintiff's Exhibits 3, 4, 5, 5A, 6, 7, 8, 8A, 9, 10, 10A, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29.

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

Ajax

vs 69 Civ 1900

Industrial

May 1, 1975

Levet, J.

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(Note received from the jury at 10:15 a.m., marked Court's Exhibit 3.)

(The jury entered the courtroom at 10:25 a.m.)

THE COURT: Mr. Foreman and members of the jury:

I received your note a few minutes ago and it reads: "Your Honor, jury wishes an explanation from you as to what constitutes a breach of contract." It is signed by Mr. Foreman.

Very well. I shall repeat, in part, at least, what I charged you before. Obviously you must first determine what the contract was. If you find that it is as the plaintiff contends, that is one thing. If, on the other hand, you find what the defendant contends, that is another thing and you must judge the situation basically upon what the contract was.

It is for you to determine, of course, from the evidence you have heard what the terms of the agreement were which was made on such and such a date between plaintiff

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

and defendant. If you find the defendant did not comply fully with the terms of this agreement as you determine them to be, then the defendant has breached said contract. If you find that the defendant did fully comply with the terms of this agreement as you have determined it, then the defendant has not breached this contract.

Now, that, in essence, is it. A contract, of course, is an agreement between two parties. Here the alleged contract was made, allegedly, by the defendant and by the plaintiff and you, as I have said several times, must determine, first, what the contract is and if you find that the defendant complied with the terms of the contract, then there is no breach. If, on the other hand, you find that it did not, then there is a breach.

I don't know whether I have covered it, Mr. Foreman, but I think that is it.

If you have any further questions, write them out and send them in.

MR. GARTNER: Your Honor, may I say a word?

MR. STREAM: Not in front of the jury.

THE COURT: Not now.

MR. GARTNER: Out of the presence of the jury.

(The jury left the courtroom to resume their deliberations at 10:28 a.m.)

THE COURT: Now what?

MR. GARTNER: Your Honor originally charged that negligence might also constitute a breach of contract.

THE COURT: I charged on negligence, counsellor.

MR. GARTNER: But your Honor charged that negligence would constitute a breach of contract, also.

THE COURT: Yes, and I charged fully on negligence. I don't think there is anything more necessary.

Mr. Stream, what do you say?

MR. GARTNER: When the jury asked for what breach of contract was, it seems to me very important in this case to tell them that the negligence might be a breach of the contract.

THE COURT: I separately charged on negligence and I don't think anything is necessary on that.

MR. STREAM: May I have a word?

THE COURT: After Mr. Gartner gets through, yes.

MR. STREAM: I find I have to interrupt him to get a word in.

MR. GARTNER: Mr. Stream, you have been offensive enough during the trial. There is no reason for you --

THE COURT: Wait a minute, Mr. Gartner. Will you please have the courtesy to sit down while your adversary is speaking?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jb4

MR. GARTNER: I'll have a word to say about courtesy later on.

MR. STREAM: The request was a request that the Court instruct the jury on what is a contract and that is precisely what the Court did. They didn't ask you what a breach was or what a cause of action was.

THE COURT: They did here.

MR. GARTNER: They did ask what a breach was.

MR. STREAM: What a breach of a contract is, your Honor, is a failure to perform. That is what the jury wanted to know; not what could constitute a breach in this case. They asked the generic question and they got a generic recharge from this Court and that is as much as this Court need do.

THE COURT: That is all I will do.

MR. GARTNER: I want to officially except to the ruling and take exception to the answer which the Court gave to the jury.

THE COURT: It's on the record.

(The jury returned to the courtroom at 10:32 a.m.)

THE COURT: I feel obliged to perhaps remind you of another factor. I believe I answered your question adequately as to what was a breach of the contract. I also charged you on negligence inthe performance of a contract

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

jb5

and there is a certain degree of merging or overlapping in that with the statement which I gave you and that is all I have to say and you may retire.

(The jury left the courtroom to resume its deliberations at 10:33 a.m.)

(Note received from the jury at 2:50 p.m., marked Court's Exhibit 4.)

xxxxx

(In open court; jury not present.)

THE COURT: I received a note to the effect that "we do not have a unanimous vote," but I am going to call them in and tell them to go back and deliberate further. This is no time to stop.

All right; get them in.

(The jury entered the courtroom at 3:00 p.m.)

THE COURT: Now, Mr. Foreman and members of the jury, I have your note, the gist of which is that you have not agreed.

I shall have to ask you to go back and deliberate some more. This is not a simple case. It is a complex case. I believe that if you review it, if you discuss the facts, if you reconsider it, you will be able to come to a unanimous vote. Obviously, there may be, at times, a divergence. However, it has been said that if there is a majority one way, then the minority should well consider

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

whether or not they should recast their decision after due deliberation and consider, at least, the reasoning of the others.

However, I do not mean to say that you should be doing anything which is contrary to your conscience and contrary to your judgment but I do feel that in this sort of a case, which is somewhat complex. of course, that you should be asked to redeliberate.

It costs money on both sides to try such a case as this. It is important to the plaintiff; it is important to the defendant; it is important to the Court. We have spent quite a bit of time on this case and I don't like to see this go down the drain, I don't like to see what is called a mistrial and I therefore request you now to go back and reconsider.

(The jury left the courtroom to resume deliberations at 3:03 p.m.)

MR. STREAM: I think, your Honor, that in this posture of the case where -- would you please sit down so I can talk to the Court -- I think, sir, in this posture of the case, where the jury began deliberating yesterday afternoon --

THE COURT: Oh, this is not long.

MR. STREAM: I think that the jury should have been

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

instructed at this time, and I say this with deference, that if they continue to have an honest difference of opinion, they are not expected to alter their opinion.

THE COURT: They will come in and say whether they are, counsellor. I don't think I need to do that. I don't think it is necessary. I instructed them to deliberate further, to reconsider, to discuss.

MR. STREAM: Well, what concerned me was the reference to the minority group -- that the minority --

THE COURT: That's a common statement.

MR. STREAM: It is a little short of an explosive suggestion but it does --

THE COURT: No. It's common. I will get you a little case from which I --

MR. STREAM: No, your Honor. I won't even except to it. I accept what you say and I won't take exception to what you said.

(The jury entered the courtroom at 3:15 p.m.)

THE COURT: Call the roll and see if anybody has disappeared.

(Jury roll called - all present.)

THE CLERK: Mr. Foreman, have the jurors agreed upon a verdict?

THE FOREMAN: We have, your Honor.

THE CLERK: Open that up and read the answers to me as I ask you the question, please.

How do you find to Question Number 1?

THE FOREMAN: No.

THE CLERK: How do you find to Question Number 2?

THE FOREMAN: Yes.

THE CLERK: How do you find to Question Number 3?

THE FOREMAN: No.

THE CLERK: How do you find to Question Number 4?

THE FOREMAN: $70,000.

THE COURT: You were told something. I don't think you remember that you were told that the amount allowed should not be more than a certain amount.

THE CLERK: How do you find to Question Number 5?

THE FOREMAN: None.

THE COURT: Now, the claim was said to be what, Mr. Stream?

MR. GARTNER: $161,000, your Honor.

MR. STREAM: I didn't hear the answer to Question 4, your Honor.

THE COURT: What's that?

MR. STREAM: I didn't hear the answer to Question 4.

THE COURT: He said they say $70,000.

I charged that you could not make it more than

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jb9

$161,000-odd.

Will counsel consent to reduce it to $161,000?

MR. GARTNER: The jury has found $70,000, your Honor.

THE COURT: Yes, I know, but I told them -- all right.

MR. STREAM: I have motions, of course.

THE COURT: I will have to entertain a motion to amend that from counsel, if that's it.

MR. STREAM: I make a motion to set aside the verdict. It is evidently a compromise verdict. It is a mathematical impossibility.

THE COURT: Well, all right. I see what you have in mind. We will wait until the jury is excused.

Will you step back into the jury room for a moment, please? Hand that in. I just want to see it.

The verdict is signed by all six of the jurors and it reads -- 1 is no; 2 is yes; 3 is no; 4 is $70,000; punitive damages, 5, is none.

(The jury left the courtroom.)

THE COURT: Mr. Stream, a motion?

MR. STREAM: YOur Honor, I move to set the verdict aside. First of all, I move to set the verdict aside under Rule 50 and ask for the same relief I asked for when I asked

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

for a directed verdict before the jury retired.

THE COURT: YOu want to file a memorandum?

MR. STREAM: I will, of course.

THE COURT: That must be done in ten days. You understand that.

MR. STREAM: Yes. What I am concerned about is that this is evidently a compromise verdict.

THE COURT: Well, I don't know that that makes any difference, really. Give me some law on that.

MR. STREAM: Following, as it did, within five minutes after the Court asked the jury to reconsider its inability to reach a verdict. The damages in this case were either 160,000 some odd thousand dollars or they were zero.

THE COURT: I don't know.

MR. STREAM: They were not informed and no one suggested --

THE COURT: Wait a minute. It is more likely here that you adversary will move to set this aside. I don't know that. They were told a limit but --

MR. GARTNER: But they were not told, your Honor, unfortunately, that they could not award something in between. The charge --

THE COURT: Well, they have reduced it, whatever

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

the reason was.

MR. GARTNER: I have suggested that the Court should notify the jurors that if they found a verdict for the plaintiff on either count that the damages should be in the amount claimed but the Court did not charge that.

THE COURT: I don't think I should.

MR. GARTNER: Well, I don't think that this is a compromise verdict at all. They believed that they --

THE COURT: Well, you make any motion in respect to this verdict that you wish.

MR. GARTNER: Well, I think, your Honor, I would like to consider that. I think I have ten days within which to do that and my motion would be for the Court to direct the jury to resume their deliberations and --

THE COURT: And do what?

MR. GARTNER: And to award the full amount, which is the --

THE COURT: Well, they were instructed to award compensatory damages, weren't they? That is, that they might award compensatory damages. And I charged them on damages and now they come in, instead of one sixty, as claimed, they give you $70,000.

MR. GARTNER: That's right. For some reason they may have thought that we were damaged only in the amount of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

jb12

$70,000 by the negligence. I don't know --

THE COURT: What's wrong with that?

MR. GARTNER: Nothing wrong with it as far as I can see. At this point I am not making a motion.

THE COURT: All right. You make no motion.

MR. GARTNER: I think we are entitled to the full amount, based upon --

THE COURT: Well, I hear no motion to that effect, counsellor.

MR. GARTNER: Well, I move that the Court correct the verdict to, in view of the --

THE COURT: I don't know how I can correct that.

MR. GARTNER: Well, in view of the finding that there was negligence and that we were damaged by the negligence, the only verdict consistent with the proof is that we were damaged to the extent of $161,000.

THE COURT: I am afraid you will have to make that motion on papers before I can entertain that.

MR. GARTNER: May I ask this question, and I must, because of my inexperience: Would it be proper for the Court to send the jury back and direct them to change the--

THE COURT: I don't see how I can, counsellor.

MR. STREAM: I would most certainly oppose that.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

I don't see --

MR. GARTNER: It seems to me, if your Honor please, that on the verdict and on the evidence that the Court has the power to change the $70,000 judgment to $160,000.

THE COURT: Upward?

MR. GARTNER: Upward.

THE COURT: I have heard of moving it downward and I have occasionally done that but I never heard of doing that, counsellor.

MR. GARTNER: Your Honor has the complete authority to set aside the verdict as contrary to the evidence --

THE COURT: Suppose you file papers within ten days and serve your adversary; exchange papers.

MR. GARTNER: We will, your Honor. Again I say in view of my inexperience with jury trials, I have to rest on the judgment of the court.

THE COURT: Well, I am not going to advise you, counsellor.

MR. GARTNER: Well, I don't know whether it would be proper for the Court to order the jury, now that the verdict has been read, to order the jury to go back, subject to a further charge that since they have found liability on one of the causes of action, they do not have the option to decide on any figure other than the figure --

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

THE COURT: For some reason, and apparently unknown as far as I can imagine, they reduced it from one sixty to $70,000. Now, who am I to say that they should up it again?

MR. GARTNER: Well, you are the judge, your Honor.

MR. STREAM: But he is not the jury.

MR. GARTNER: But the judge has the power to revise --

THE COURT: All right. I say make your motions and cite any authorities that apply to this kind of a situation.

MR. STREAM: The record is clear, is it not, your Honor, that I have moved at this time to set the verdict aside on the grounds that it is an evident compromise.

THE COURT: Yes. You better move for consideration of the liability angle of it, if you wish me to get into that at all. I am not seeking it; don't misunderstand me.

MR. STREAM: No. I don't think that this Court has the power to correct the verdict. This is not a mathematical error. This is simply a compromise. The damages were fixed in an amount reflected by the exhibit at a certain sum of money and the jury came in with a compromise.

MR. GARTNER: One exhibit contained the amount paid, your Honor.

THE COURT: I thought they had it from that.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Otherwise, there would have been some difficulty.

MR. STREAM: And compromise verdicts must, of course, be set aside. All right, your Honor. I will have my papers within the requisite ten days and I think it is within ten days after judgment.

THE COURT: I'll view it then as of today. The judgment could be entered now.

MR. STREAM: Let's see what the rule says.

MR. GARTNER: Ten days after judgment.

THE COURT: Suppose I direct the entry of this judgment now, then.

MR. STREAM: Well, the judgment has to be prepared and entered, your Honor. It can't be done today.

THE COURT: I thought you would like to have the entry of judgment deferred until the determination of the motions. If you do, I'll do it that way.

MR. STREAM: I don't care, your Honor, whether the motions are resolved before or after the entry of judgment. A motion has to be made and I will make it on papers.

THE COURT: All right. I will direct, if there is no objection, that the Clerk enter judgment for the sum of $70,000 and costs but stay the execution thereof until the determination of these motions. That is, I assume, agreeable to both counsel.

MR. STREAM: Yes, your Honor.

MR. GARTNER: Yes, your Honor.

THE COURT: Now, there may be a problem, gentlemen, about interest. I don't know what the respective contentions are. First, is there interest allowable, prejudgment interest and, secondly, from what date?

MR. GARTNER: Oh, yes. Our contention is that prejudgment interest is allowable from May 8, 1968.

THE COURT: All right. You submit a memorandum on that, too.

MR. GARTNER: Yes, your Honor.

THE COURT: And Mr. Stream, you may submit one.

MR. STREAM: All right, judge.

THE COURT: This, of course, it seems to me -- and I don't know what you think about it -- is a liquidated amount, or is it unliquidated? Probably unliquidated; isn't it?

MR. STREAM: This is a suit for liquidated damages.

THE COURT: That increases the chances of allowing prejudgement interest, doesn't it?

MR. STREAM: That may well be. I am not concerned about prejudgment interest. I am simply concerned about this being an evident compromise verdict and I am going to rest my motion on that, alone.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

THE COURT: You are going to move for judgment of dismissal notwithstanding the verdict; is that it?

MR. STREAM: Precisely so, your Honor; yes.

THE COURT: In other words, you are going to move and you have no reason to make any motion on the punitive damages and there was "no" on the fraud and I reserved on that, so there is no motion to be made about fraud nor about the punitive damages, since they did not award any and I won't hear any tale about that they should have given punitive damages at this time.

Is it clear now, gentlemen, what we are doing?

MR. STREAM: Yes, sir.

MR. GARTNER: Well, we are reserving our rights to make any motions, your Honor.

THE COURT: All right. Make them in time, though.

MR. GARTNER: Of course we will.

THE COURT: Now I am going to dismiss the jurors in view of your motion.

(The jury entered the courtroom.)

MR. STREAM: I would like the jury polled.

MR. GARTNER: Your Honor, if there is going to be anything like that, then I would move that --

THE COURT: Now don't make any motions before the jury.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

MR. GARTNER: Well, could we --

THE COURT: I will poll the jury and see if this is their vote.

Will you do so, Mr. Clerk?

THE CLERK: Yes, your Honor.

THE COURT: And then I will excuse the jurors and ask them to remain a few minutes.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say you find to Question Number 1 a verdict of no; to Question Number 2, a verdict of yes; to Question Number 3, a verdict of no; to Question Number 4, a verdict of $70,000; to Question Number 5, a verdict of none.

(Each juror, upon being asked by the Clerk "Is that your verdict?", answered in the affirmative.)

THE CLERK: The jury is polled.

THE COURT: Very well. You are excused and, since you no longer have any time to serve as jurors in this appointment, I assume you may go.

THE CLERK: Yes, your Honor. They are completely finished; discharged.

THE COURT: You might wait just a moment in the jury room. There maybe something else that I must call to your attention.

(The jury left the courtroom.)

THE COURT: I have already decided that I cannot return this problem to the jury at this time and you have indicated that you want to make motions. I don't know what you wanted to say to me.

MR. GARTNER: I simply wanted to ask your Honor again whether it is inconceivable that you could return it to the jury with proper instructions.

THE COURT: How could I, counsellor?

MR. GARTNER: I don't know. I am asking your Honor. I don't pretend to know everything, your Honor, and I just don't know. I haven't had this kind of experience before, where a jury comes in with this kind of a verdict and it seems to me that if the instructions had been a little clearer, it wouldn't have happened this way.

THE COURT: Well, you heard my instructions and you didn't take any exceptions, so that's a rather belated statement.

MR. STREAM: Counsel has a perfect right, if he feels aggrieved, to move to set aside the verdict and I will consent to a new trial. This Court may find itself not only having the power but having the obligation to set this verdict aside and directing a new trial in this case.

(Trial concluded.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580